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CONSULTATIONS ON COMPETITION LAW AND POLICY, INCLUDING THE MODEL LAW AND STUDIES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES

A preliminary report on how competition policy addresses the exercise of intellectual property rights

Executive summary

Intellectual property rights (IPRs), granted by patents, copyrights, trademarks, etc., play an important role in fostering innovation and sustaining economic growth. These rights allow their holders to exclude, for a limited amount of time, other parties from the benefits arising from new knowledge and, more specifically, from the commercial use of innovative products and processes based on that new knowledge. IPRs, by granting legal exclusivities, may also confer on their holders the ability to exercise market power, at least when similar technologies and products representing viable constraints are not present. Such exercise of market power can lead to allocative inefficiencies. The reward deriving from IPRs is directly related to the duration and scope of those rights. Determining the duration and scope of IPRs is usually not a task assigned to competition policy-makers, but competition policy certainly plays an important role in limiting the extent of market power associated with IPRs, ensuring in particular that such power is not excessively compounded or used as leverage and extended to other unrelated markets. Patents, in fact, do not give the right to exclude competition among different patented products. In this respect, competition policy has a role in limiting monopolistic abuses related to the exercise of IPRs. It plays this role by preventing firms holding competing intellectual property rights from engaging in anti-competitive practices.

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1. Introduction

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its session on 29-31 July 1999, requested the UNCTAD secretariat to prepare for the next meeting a preliminary report on how competition policy addresses the exercise of intellectual property rights 1/ (agreed conclusions, paragraph 7 (c), in annex 1 of the report of the Intergovernmental Group of Experts on Competition Law and Policy (TD/B/COM.2/CLP/5)). On the basis of this preliminary report, delegations may wish to give further guidance to the secretariat on how to proceed with respect to the final draft of the report, as well as provide information on national policies and procedures relevant for the application of competition policy to the exercise of intellectual property rights.

2. The role of intellectual property rights in promoting innovation

2. Intellectual property rights (IPRs), granted by patents, 2/ copyrights, 3/ trademarks, 4/ etc., play an important role in fostering innovation and sustaining economic growth. These rights allow their holders to exclude, for a limited amount of time, other parties from the benefits arising from new knowledge and, more specifically, from the commercial use of innovative products and processes based on that new knowledge. The ability to temporarily exclude others from the enjoyment of the potential benefits deriving from innovation contributes to providing the incentive for individuals and enterprises to allocate financial and human resources in research and development (R & D) and other costly activities to realize new discoveries, innovative products and production processes.

3. In the absence of the legal protection ensured by IPRs, rival firms would be entitled to free-ride on the successful results of R & D investments, imitating and exploiting commercially new inventions. 5/ IPRs also contribute to promoting the dissemination and commercial application of intellectual property. Firms, in fact, can be expected to be more inclined to transfer new technologies and inventions when a sufficient degree of legal certainty regarding the returns from sharing precious innovative ideas is guaranteed. In some cases, even in the absence of IPRs, firms may still be able to exclude competing firms from having access to their innovations. In these cases, IPRs would not be necessary to recover the investments incurred. However, excluding other firms from sharing know-how is not always possible. Also, a sizeable waste of resources can result from the efforts aimed at maintaining secrecy. In the absence of strong IPRs, an inefficient tendency to allocate resources particularly to those innovative activities which can be more easily kept secret can be expected.

3. Intellectual property rights and the trade-off between allocative and dynamic efficiency

4. IPRs, by granting legal exclusivities, may also confer to their holders the ability to exercise market power, 6/ at least when similar technologies and products representing viable constraints are not present. Such exercise of market power can lead to allocative inefficiencies: owners of exclusive rights are likely to restrict output levels compared to more competitive situations in the markets for the goods and services incorporating those

rights. They will do so in order to maximize their profits. If the supply of these goods and services was expanded, therefore, an increase in society's welfare, through a more efficient allocation of resources, would result. It has been observed, 7/ however, that IPRs, while ensuring the exclusion of rival firms from the exploitation of patented technologies and derived products and processes, do not necessarily confer market power on their holders. 8/ In fact, technologies which can be considered, at least to a sufficient degree, potential substitutes do represent effective constraints on the ability of IPR holders to price their products above competitive levels. Only when alternative technologies are not available can IPRs be said to grant their holders monopolistic positions in relevant markets defined appropriately. 9/

5. The exercise of exclusive IPRs which give monopolistic power leading to allocative inefficiencies in the absence of competing technologies and products may appear to contrast with what is generally perceived in most jurisdictions as the main objective of competition policy: the protection of the competitive process to ensure an efficient allocation of resources, lower prices and greater consumer choice. Competition policy, however, recognizes that in some circumstances, society would be better off by allowing for limited market restrictions, monopolistic profits and short-term allocative inefficiencies, when these can be proven to promote dynamic efficiency and long-term economic growth. 10/ This trade-off, which has to be weighed by competition policy-makers in many areas (mergers, joint-ventures, etc.), is clearly a central issue in the interface between competition policy and intellectual property protection: short-term inefficiencies are expected to be the price that society needs to pay in order to receive the "reward" of long-term economic growth. 11/

6. While the need to grant exclusive rights in order to promote innovation is a relatively accepted principle, defining the boundaries of such rights is a more complex and thorny issue. The risk of reducing social welfare by granting excessive market exclusivities and extra profits compared to those necessary to recover the investments made and ensure sufficient incentives is always present.

7. The reward deriving from IPRs, in fact, is directly related to the duration and scope of those rights. Determining the duration and scope of IPRs is usually not a task assigned to competition policy-makers. 12/ Competition policy certainly plays an important role, however, in limiting the extent of market power associated with IPRs, ensuring in particular that such power is not excessively compounded or used as leverage and extended to other unrelated markets. Patents, in fact, do not give the right to exclude competition among different patented products. In this respect, competition policy has a role in limiting monopolistic abuses related to the exercise of IPRs. It plays this role by preventing firms holding competing intellectual property rights from engaging in anti-competitive practices.

4. Competition policy and the exercise of intellectual property rights

8. Many competition authorities conduct their enforcement activity vis-à-vis the exercise of IPRs by treating such rights as similar to other

forms of property. Differences exist, however, regarding the consideration accorded to the greater risk of free-riding behaviour arising with IPRs and to the fact that intellectual property can be more easily appropriated. 13/ Also, anti-competitive practices are often evaluated for their effects both on products and on technology markets. In fact, restricting competition among competing technologies has welfare-reducing effects parallel to those which would occur with restrictions in products markets.

9. Another important principle of competition policy vis-à-vis the licensing of IPRs, coherent with the general approach adopted in all other areas of enforcement, consists in drawing a clear distinction between the horizontal and vertical effects of licensing arrangements. Horizontal practices, resulting in coordination of activities among actual or potential competitors, are more likely to have negative effects on competition and on welfare. Anti-competitive behaviour related to the exercise of IPRs between direct competitors clearly occurs, for example, when holders of substitutable technologies enter into cross-licensing arrangements which are disguised cartel agreements aimed at setting commonly agreed prices for the (competing) products and services incorporating those technologies. 14/ These closely resemble those agreements, not necessarily confined to the intellectual property area, which are considered by most jurisdictions as the most harmful forms of anti-competitive behaviour.

10. Other types of horizontal agreements among holders of competing technologies such as joint ventures can also adversely affect competition. These types of agreements, however, are more likely to be associated with efficiencies (the realization of economies of scale, elimination of duplication in R & D, etc.), resulting in a net welfare benefit. Competition authorities, as with their approach to other horizontal practices, evaluate these types of agreements on the basis of the specific circumstances of the case, analysing the underlying market conditions, such as the degree of concentration and the relative intensity of barriers to market entry. The market share held by the firms involved in the licensing practices is usually particularly important in the analysis. When licensors hold limited market shares, negative effects on competition are less likely.

11. Vertical arrangements (i.e. restrictions between holders of IPRs and firms using those rights as inputs for their activities), on the other hand, are often viewed as tools to coordinate the incentives of downstream licensees with the interest of upstream licensors, so as to reduce transaction costs, opportunistic behaviour and free-riding opportunities by either upstream or downstream firms. 15/ A general exception to the generally more lenient stance vis-à-vis vertical licensing arrangements applies, in almost all jurisdictions, to practices aimed at fixing the resale price of goods or services incorporating intellectual property. Vertical price fixing (resale price maintenance) is banned in most jurisdictions, including in the context of technology licensing arrangements. Vertical arrangements can be expected to result in anti-competitive and welfare-reducing effects when they are imposed on downstream firms by companies holding a strong and unrivaled market position. To be considered vertical, a licensing agreement needs to involve firms which are not actual or potential competitors. This assessment is often

difficult to make, as licensees may often have the necessary capabilities for developing independently new technologies and therefore be, in reality, potential competitors.

12. The role that competition policy plays in monitoring excessive exploitation of market power in connection with the exercise of IPRs is particularly important in the review of the anti-competitive effects of licensing contracts (regulating the transfer or exchange of rights to the use of intellectual property) containing exclusivity or restrictive clauses. It is commonly agreed that the licensing of intellectual property generally has beneficial effects. It facilitates the diffusion of technological innovation and know-how and their exploitation by firms which may have a greater comparative advantage. Production can be made more efficient and product quality enhanced when technologies are used in a complementary manner. Also, licensing patented technology may increase the return to IPR holders, therefore increasing firms' incentives to pursue investment in R & D. In fact, welfare would be reduced if innovators and IPR holders were forced to enter into direct production and commercialization and not allowed to license their know-how to third parties better positioned to manufacture and market licensed goods and services.

13. Nevertheless, the transfer of patented technology may involve excessive and unnecessary restrictions on competition, depending on the specific contractual arrangements and market conditions. An overview of the pro-competitive and anti-competitive effects of four frequently used types of contractual restrictions is presented below (the final report will attempt to provide a more exhaustive treatment of licensing restrictions, such as refusal to license, excessive pricing, etc.). These restrictions are territorial exclusivities, exclusive dealing, tying requirements, and grant-back requirements. They are often used as tools to facilitate the transfer of technology, but under some circumstances, they may also lead to an undue restriction of competition.

14. A general principle when reviewing licensing restrictions is to assess what the consequences would be for the concerned markets if such restrictions were prohibited. In fact, prohibiting contractual restrictions might simply lead licensors to decide no longer to license the concerned technologies, preferring to integrate vertically into direct production or deciding altogether not to exploit them commercially. The alternative predictable outcome, for example forcing the licensor to enter into downstream activities, may ultimately lead to a reduction in welfare. As part of the analysis of competition authorities, an assessment of the likely alternative scenarios in case of prohibition of contractual restrictions is often conducted.

Territorial exclusivity and parallel imports

15. When it is feasible to divide up markets into separate territories and block or sufficiently limit trade flows to keep prices at the highest level that each market can bear, licensors may choose to assign areas (a region, a city, or an entire country) in exclusivity to single licensees. Two different types of territorial exclusivity exist: an "open" and a "closed" version. Open territorial exclusivity refers to the contractual right to be the exclusive licensee in a given area, without protection from competition by

parallel importers getting their products from licensees of other areas. 16/ Closed territorial exclusivity refers to the complete exclusive right to any sale within a territory. With closed territorial exclusivity, parallel imports are barred and stop representing a source of competition for the products distributed by the local exclusive licensee.

16. It has been observed 17/ that a holder of IPRs who divides up the market among different licensees, each with an exclusive territory, does not create additional monopoly power. He already holds exclusive rights in each area (or country) where local territorial exclusivities are set up. Territorial exclusivities may in fact be created for different reasons, some of them unrelated to anti-competitive behaviour, which can promote efficiency and consumer welfare. A reduction in intra-brand competition (competition among distributors of the same good) may be a necessary condition to enhance inter-brand competition (competition among different brands). Local licensees, for example, may need to incur substantial investments in order to promote new products recently introduced in the market, still unknown to most consumers. They might do so, for example, through advertising campaigns, distribution of free samples of the products, showrooms, etc., or through an improvement of the licensed products, adapting them to local demand. Territorial exclusivity may avoid free-riding opportunities on these investments by other licensees. 18/

17. For a limited number of products, open territorial exclusivities may produce a sufficient return for the investments incurred by local exclusive licensees. Nevertheless, when trade barriers are limited and transportation costs are non-substantial, significant free-riding can occur through sales by parallel importers which undermine the possibility of local licensees to recover local costs. Closed territorial exclusivities might, on the other hand, lead to excessive double mark-ups by licensees, hurting the interests of IPR licensors. Licensees with downstream monopoly power may in fact reduce outputs and charge prices that are excessively high, to the detriment of the whole vertical structure: lower prices deriving from greater vertical coordination would lead to greater profits for both licensors and licensees. With parallel imports, exclusive licensees are constrained in their ability to impose excessive mark-ups. If prices become too high, parallel imports can exert downward pressure on prices.

18. Another important reason for IPR holders to enter into territorial exclusivities is to profit from price discrimination. Particularly when regions or countries have different demand elasticities, charging different prices in different areas would lead to an increase in total profitability. More specifically, total profits are maximized by charging higher prices in areas where demand is more inelastic. With international price discrimination, national objectives of competition policy, i.e. maximizing the welfare of a country's own citizens, might, however, diverge from the achievement of global welfare. From an international welfare perspective, exclusive licences across countries can be employed, as mentioned, to achieve price discrimination and therefore be associated with efficiency-enhancing effects, because of the resulting worldwide expansion in output. However, from the perspective of the country in which higher prices are charged, an elimination of territorial exclusivities (or at least of the ban on parallel imports) may bring about net benefits, particularly when the holders of IPRs

are located abroad. In fact, competition will bring down prices, entirely to the benefit of national welfare, while the costs of reduced incentives to innovate will be spread among all countries. This is particularly true for countries which are net importers of technology. Such is the case for most developing countries. It might therefore be a totally rational choice to prohibit territorial and other forms of licensing restrictions.

19. It is important, however, to consider the consequences of attempts to impede inernational price discrimination: TNCs might opt to block licensing of their technologies altogether. Also, it has been argued 19/ that international price discrimination and the ban on parallel imports benefit mainly developing countries because enterprises from more industrialized (and wealthier) countries can charge lower prices in poorer markets without being forced to lower their prices in rich markets as well. In this way, TNCs supply markets which would not have been serviced in a content of forced uniform pricing. 20/

20. An additional consequence of territorial exclusivities is that they can also facilitate the implementation of disguised cartel arrangements. For example, competing firms holding a significant amount of the total patents specific to a particular class of products could agree to issue exclusive licences to a jointly owned corporation, which would then divide up the market among the associated firms through territorial exclusivities. Such an agreement would clearly lead to a substantial reduction in competition because it would concern firms which otherwise (in the absence of the licensing agreement) would have competed head-to-head with each other and would not involve firms operating at different levels of the vertical production chain.

21. Assigning territorial exclusivities may also be a direct tool to facilitate collusion among competing licensors, by making it easier to monitor downstream violations of cartel agreements. Competing licensors, in fact, may find it difficult to agree on prices for royalties regarding licensed technologies and may find it easier to agree on prices of the final products supplied by their licensees. Territorial exclusivities allow for easier monitoring of licensees' final prices. The treatment by competition policy-makers of territorial restrictions clearly depends on the prevailing motivation for their use in each specific case and their likely effect. Particularly when these arrangements do not appear to lead to any sizeable efficiency but rather are part of a scheme to ensure market cartelization, their impact on competition and welfare can be expected to be negative. If, on the other hand, they are used to overcome free-riding, to cope with asymmetries in information between licensors and licensees or to ensure price discrimination, their impact on welfare is more ambiguous and depends largely on market concentration and barriers to entry.

Exclusive dealing

22. Exclusive dealing arrangements prevent licensees from manufacturing products which employ technologies supplied by competitors of the licensor. This parallels exclusive dealing arrangements in distribution agreements whereby retailers are not allowed to carry competing brands. The rationale for entering into exclusive dealing restrictions in intellectual property licensing is similar to that applying to product markets: to avoid

free-riding opportunities between competing licensors and to promote the development of relationship-specific technologies by both licensors and licensees. 21/

23. Licensors transferring know-how to licensees also manufacturing goods under licence of other firms may risk leakage of information and misappropriation of their patented knowledge. The development of exclusive relationships with licensees can be a way to overcome this potential free-riding situation. Also, exclusive dealing may increase the return on specific investment because the likelihood of licensees interrupting a consolidated relationship with the licensor is reduced. Exclusive dealing arrangements may, however, also result in market-foreclosing effects to the detriment of rival licensors and restrict competition in the market, particularly when the firms entering into such arrangements already hold a large share of the relevant product market. The foreclosing effect depends to a large degree on the availability of alternative manufacturing capacity for existing or new licensors.

Tying requirements

24. Tying refers to a contractual obligation whereby a manufacturer agrees to sell a certain good only to buyers which agree to buy other, unrelated products. Tying can be used for purposes which may increase welfare such as to protect the reputation of licensed technology. For example, a manufacturer of a new model of photocopy machines may require that buyers of the new model purchase spare parts and repair services from the manufacturer. This requirement may be used to ensure that the perceived quality of the machine to users is not reduced by low-quality maintenance services or spare parts. Tying may also reduce the risk inherent in the licensing of innovations whose commercial value is still uncertain. This can be achieved by charging less for the innovation and tying it to an additional good whose demand is correlated with the use of the innovation.

25. More generally, tying is used to price discriminate between consumers who use products or technologies with varying intensity. For example, cameras may be leased to customers on condition that films used be bought from the leaseholder. Price discrimination, as noted earlier, can promote welfare because it may lead to an expansion of output, making products available to users who would not otherwise have been supplied because of monopoly output restrictions associated with uniform pricing. Tying, however, can also result in clearly welfare-reducing effects when it is employed as a tool to foreclose other markets. This can be achieved if the licensor holds considerable market power in the tying product and the foreclosing effects in the tied products are substantial.

Exclusive grant-backs

26. This type of restriction refers to the situation whereby licensors ask to receive all the rights on new technologies developed by licensees through improvements on the licensed technology. While it may facilitate the transfer of technologies to licensees, it may also negatively affect licensees' incentive to engage in R & D. Non-exclusive grant-back clauses, whereby

licensees are allowed to deal with other buyers of their incremental inventions, are less likely to reduce competition while maintaining adequate incentives to license new technologies.

5. The TRIPS Agreement, competition policy and intellectual property rights

27. The recognition of the contribution of intellectual property protection in fostering economic growth is one of the main tenets of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiated during the Uruguay Round. The Agreement has introduced common minimum standards of protection and enforcement of IPRs in the international trading system which are binding for all member countries. It is expressely stated that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology (arts. 7 and 8). IPRs should contribute to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.

28. The role of competition policy in ensuring that IPRs promote economic growth and innovation is expressly stated in the TRIPS Agreement: "*Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market*" (art. 40.2). It allows Member countries "*to adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices ... in the light of the relevant laws and regulations of that Member ...*". The repression of anti-competitive practices associated with IPRs is therefore assigned to national competition laws and policies. Nevertheless, the need for international cooperation is also emphasized. In particular, consultations among Member countries are envisaged, 22/ inter alia through the supply of publicly available non-confidential information.

6. Recommendations for future work

29. The Intergovernmental Group of Experts was given the task by the Third United Nations Review Conference (1995) to further strengthen common ground among States in the area of competition law and policy, identifying restrictive business practices that affect the economic development of countries. "The interface between competition law and policy, technological innovation and efficiency" and "the competition policy treatment of the exercise of intellectual property rights (IPRs) and of licences of IPRs or know-how" were recognized as two areas where the identification of broad similarities in approach should be promoted. A greater convergence of competition law and policy enforcement principles vis-à-vis the exercise of intellectual property rights may in fact enhance global welfare by reducing inconsistencies and preventing friction in the international trading system. To advance this long-term objective, a major step would consist in strengthening the mutual understanding of national approaches, including commonalities and divergencies. This learning process would particularly profit those countries that have only recently created institutions

responsible for the enforcement of competition policy and intellectual property protection 23/ and which therefore lack enforcement experience.

30. The specific problems facing developing countries in the application of competition policy in the area of intellectual property rights - due to their constraints in terms of specialized personnel - were identified in a 1996 UNCTAD report 24/ on the consequences for developing countries of the TRIPS Agreement. The importance for developing countries of developing sufficient expertise with respect to the proper application of competition policy principles in the area of intellectual property is related to the fact that the assessment of the anti-competitive effects of IPR licensing practices is very complex in many cases and best conducted by taking into account both welfare enhancing and welfare reducing effects.

31. The final draft of this report should therefore aim at including a detailed analysis, based on national contributions submitted to the secretariat, of the analytical framework adopted by competition authorities in different jurisdictions having already acquired experience in this area (including countries at different stages of economic development). A substantial amount of information about some jurisdictions (United States, European Union, Canada and Japan) is already available to the secretariat, but information will have to be obtained on a greater number of countries. In particular, for different jurisdictions, the final report will look at: the existence of competition policy provisions which apply specifically to the IPR area; the role of guidelines used by competition enforcement agencies in the evaluation of IPR-related practices; national notification systems for IPR practices; relevant cases in the IPR area; the contribution made by competition authorities to the definition of the scope and duration of patents. A section of the final report will also examine alleged inconsistencies between the achievement of national welfare on the one hand and global welfare on the other and possible ways to overcome these inconsistencies.

Notes

1/ The Third United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in 1995, had already identified "*the competition policy treatment of the exercise of intellectual property rights (IPRs) and of licenses of IPRs or know-how*" as one of the policy areas to be examined more closely by the Intergovernmental Group of Experts in order to identify and strengthen common ground among member States.

2/ "*Patents provide an inventor with exclusive rights to a new and useful product, process, substance or design. New products include machines (mechanisms with moving parts) or manufactured articles, such as tools, without moving parts. New processes, or methods, include chemical processes for treating metal or manufacturing drugs, mechanical processes for manufacturing goods, or electrical processes. New substances include chemical compounds and mixtures: the concept covers the composition of matter. New forms of plants can also be covered. New designs include the shapes of products where the shapes serve a functional purpose. In addition,*

improvements on products, processes, and substances may be patented." Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization, New York, HarperCollinsPublishers, 1989.

3/ *"Copyrights give a creator the exclusive production, publication or sales rights to artistic, dramatic, literary or musical works. Examples include articles, books, drawings, maps, musical compositions or photographs."* Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization, New York, HarperCollinsPublishers, 1989.

4/ *"Trademarks are words, symbols, or other marks used to distinguish a good or service provided by one firm from those provided by other firms."* Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization, New York, HarperCollinsPublishers, 1989.

5/ The free-riding problem associated with intellectual property can be well illustrated by way of an example. Once a firm has incurred substantial expenditures in R & D for the development, for instance, of a new, more powerful, type of underwater camera and the first prototype has been realized, it can produce and market the camera on a large scale at a relatively low cost. If the results of the R & D efforts cannot be kept secret but can be easily appropriated, then competing firms would be able to quickly use the results of that research, enter into production of the same innovative new model of underwater camera and sell it at a much lower price. These rival firms, in fact, would not need to recover the costly R & D activities. The innovative firm, on the other hand, might not be able to recover all the costs incurred, since it might be expected that it will have to charge a higher price. If this is allowed to happen, no firm, in the expectation of free-riding behaviour, would incur the mentioned sunk costs in R & D. With well enforced IPRs, conversely, the innovative firm can take advantage of temporary exclusivity in the exploitation of its R & D efforts and produce the new type of camera avoiding potential free-riding practices of other firms.

6/ Market power can be defined as the ability to maintain prices above competitive levels for a significant amount of time and profit from such rise in prices.

7/ See, for example, Competition Policy and Intellectual Property Rights, Paris, Organization for Economic Co-operation and Development (OECD), 1989.

8/ In a survey conducted in 1981, licensors reported that they faced no alternative supplier only in 27 per cent of cases. Competition Policy and Intellectual Property Rights, Organization for Economic Co-operation and Development (OECD), 1989, pp 16-17.

9/ In order to delimit relevant markets, an assessment of all goods (or services) that are perceived as directly interchangeable by consumers is usually conducted. To verify substitutability, reference is often made to the cross-elasticity of demand: two goods are viewed as belonging to the same market when the increase in the price of the first one causes a non-marginal increase in the quantity requested of the second. In view of resource and time constraints, competition authorities very often do not have access to

actual estimates of cross-elasticity in their determination of relevant markets. Use is therefore made of other types of evidence such as market surveys of consumer preferences. The relevant market also has a geographic dimension: it is defined as including all areas where concerned consumers are able and willing to redirect their purchases.

10/ *"The domestic economy can continue to expand only if it succeeds in producing either new products that consumers desire or existing products at lower costs. In the language of welfare economics, a reduction in cost typically has a greater welfare consequence than an equal reduction in price. A reduction in price increases total economic welfare (the sum of the economic benefits to consumers and producers) only to the extent that it increases output. The change in price by itself is a transfer of economic benefits between consumers and producers, with no direct impact on the total. A reduction in cost has a direct benefit by freeing resources that can be used elsewhere in the economy."* Richard J. Gilbert, Steven C. Sunshine "Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets", Antitrust Law Journal, Vol. 63, 1995.

11/ Several studies have revealed the important role played by technological innovation in increasing productivity and promoting economic growth. Some of these studies are referred to in UNCTAD, "Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development" (TD/B/COM.2/EM/10/Rev.1).

12/ In a recent round table organized at the OECD, one of the points stressed by participants was that competition authorities should also use their competition advocacy powers in order to ensure that patent offices are aware of the anti-competitive effects of over-broad patents. See Competition Policy and Intellectual Property Rights, OECD, 1998, Executive Summary, pp. 7-12.

13/ For example, in the "Antitrust Guidelines for the Licensing of Intellectual Property", issued in 1995 jointly by the United States Department of Justice and the Federal Trade Commission, it is stated that: *"The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property. That is not to say that intellectual property is in all respects the same as any other form of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles"*.

14/ Agreements aimed at sharing markets and restricting output have similar anti-competitive effects.

15/ See "Competition policy and vertical restraints" (UNCTAD/ITCD/CLP/Misc.8), 1999.

16/ This is the case, for example, within the European Union, where barring parallel importation of goods and services supplied by foreign manufacturers is prohibited. Allowing open territorial exclusivities but barring closed territorial exclusivities is referred to as the exhaustion principle.

17/ See, for example, Patrick Rey and Ralph A. Winter, "Exclusivity restrictions and intellectual property" in Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy (General Editors: Robert D. Anderson and Nancy T. Gallini), 1998.

18/ Without repression of free-riding behaviour, licensees would not invest in local markets and ultimately consumers would not have access to their goods.

19/ See David A. Malueg and Marius Schwartz "Parallel imports, demand dispersion and international price discrimination", Economic Analysis Group Discussion Paper, United States Department of Justice, Antitrust Division, 25 August 1993.

20/ A criticism to the arguments brought forward in the article by Malueg and Schwartz illustrating the benefits for developing countries of international price discrimination can be found in Frederick M. Abbott, "First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation", Journal of International Economic Law (1998). It is stated that "... (Malueg and Schwartz) ... *do not consider the impact of an international price discrimination system on developing country producers and consumers acting outside the field of the monopolist's product. Most importantly, they do not consider the broader effects of an international price discrimination system on the international allocation of resources. If developed country producers are not pressured to become more efficient as a consequence of price competition, this will distort the efficient allocation of resources in the developed countries. If developing country producers/licensees are limited in the profitability of their operations, this will limit developing country investments in future production. If the profit-making potential of capital investments in developing countries is limited, this will encourage developing countries to continue to rely on capital intensive developed country exports ...*". It is also noted that "*... A substantial part of international trade is in goods that are not protected by IPRs, particularly in the commodities and unfinished goods sectors. Developing countries are not unserved with these products. Developing country buyers may be served with lower-priced IPRs-protected goods through product differentiation.*"

21/ See Patrick Rey and Ralph A. Winter, "Exclusivity restrictions and intellectual property" in Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy (General Editors: Robert D. Anderson and Nancy T. Gallini), 1998.

22/ "*Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this*

Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member." TRIPS Agreement, Article 40.3.

23/ In some countries, the two functions (competition policy and intellectual property protection) are assigned to a single agency. This is the case, for example, in Peru.

24/ UNCTAD, The TRIPS Agreement and Developing Countries, New York and Geneva, 1996 (United Nations publication, sales no. 96.II.D.10).

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EXPERIENCES GAINED SO FAR ON INTERNATIONAL COOPERATION ON COMPETITION POLICY ISSUES AND THE MECHANISMS USED

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Executive summary

This report focuses on three types of international instruments dealing with competition law and policy, namely: bilateral competition law enforcement cooperation agreements; free trade, customs union or common market agreements; and multilateral instruments. The implementation of such agreements has helped to minimize conflicts among Governments and to facilitate enforcement in this area. However, several concerns continue to impede the further development of enforcement cooperation. Moreover, developing countries have not so far significantly participated in such cooperation. To overcome such impediments and to promote the participation of developing countries, it would be necessary to build up mutual confidence gradually, by evolving from simple to more complex cooperation agreements.

Balanced cooperation among developing countries would provide a learning experience and help ensure that cooperation with more advanced partners was fruitful. Free trade or common market agreements might provide a conducive framework for this purpose, but regional rules, institutions and mechanisms would need to be adapted accordingly, and a degree of compatibility ensured among national, subregional and interregional competition regimes. The consultations mechanism established under the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices might be used to discuss how this might be done and what might be the appropriate balance between convergence and diversity in competition laws and policies; it might also promote cooperation in specific cases. Such consultations could provide an input to the ongoing discussions or any future negotiations within the World Trade Organization.

INTRODUCTION

1. The Expert Meeting on Competition Law and Policy, held in November 1997, requested the UNCTAD secretariat to prepare a preliminary report of a study on experiences gained so far on international cooperation on competition policy issues and the mechanisms used. 1/ The preliminary report was accordingly presented to the first session of the Intergovernmental Group of Experts on Competition Law and Policy, held from 29 to 31 July 1998, at which he UNCTAD secretariat was requested to prepare for consideration by the forthcoming meeting of the Group of Experts a report on the same subject, taking into account comments and information received from member States by 31 January 1999. 2/ This report has been prepared in response to this request.

2. For the purposes of this study, international cooperation in the area of competition law and policy is interpreted in a broad sense, covering: (a) cooperation aimed at avoiding conflicts between Governments or facilitating enforcement against restrictive business practices (RBPs) (which is reciprocal in principle); (b) technical assistance for adopting, reforming or enforcing competition law and policy, provided by countries which are more experienced in this domain to those less experienced; and (c) the promotion of convergence or harmonization of competition laws or policies. However, the present study mainly concentrates on (a) (experiences in respect of technical assistance are discussed in TD/B/COM.2/CLP/12).

3. International cooperation in this area can take place either on an informal basis, or in pursuit of the application of an international instrument (the term "instrument" is used here to cover both legally binding treaties or agreements and non-binding recommendations or undertakings). Chapter I describes different types of bilateral, regional, plurilateral and multilateral cooperation instruments with a bearing on competition law and policy. Chapter II describes experiences in cooperation on competition law and policy. Factors which have either facilitated cooperation or made it more difficult are analysed, and suggestions are made as to how it might be developed. Finally, three annexes to this study respectively list a selection of three types of instruments dealing with competition law and policy, namely: bilateral agreements on competition law enforcement; free trade, customs union or common market agreements; and multilateral and plurilateral instruments. Only instruments currently in force are referred to, in a roughly chronological order.

Chapter I

INSTRUMENTS OF INTERNATIONAL COOPERATION ON COMPETITION LAW AND POLICY

A. Overview

4. This chapter distinguishes the following six types of international instruments dealing with competition law and policy: (a) bilateral agreements focusing on cooperation in competition law enforcement; (b) bilateral mutual legal assistance treaties, which would apply to criminal antitrust cases as well as other criminal cases; (c) friendship, commerce and navigation treaties concluded between the United States and several other countries, which include clauses referring to cooperation on antitrust matters; (d) bilateral agreements for technical cooperation in economic regulation, including competition law and policy; (e) free trade, customs union or common market agreements, including regional or subregional agreements or bilateral agreements concluded within a regional framework, covering competition law and policy as one element in a broader relationship; and (f) multilateral instruments, whether or not they are of a legally binding nature, which are universally applicable or are of a plurilateral nature, and cover a range of issues or focus specifically on competition law and policy. In practice, the borderlines between these different categories of instruments are often blurred, while other instruments not mentioned here may also have some bearing on competition law and policy. Some typical provisions of such agreements and notable features of specific agreements are described below. Each type of instrument is dealt with in a separate section of this chapter, except that types (b), (c) and (d) are grouped together in the same section, since they have in common the fact that they deal with cooperation on competition law as one element in a wider bilateral cooperation agreement.

B. Bilateral agreements on competition law enforcement

5. As may be seen from annex 1, the United States is party to most of the agreements of this type (talks for an agreement between Japan and the United States on cooperation on antitrust activities are now proceeding). An agreement between the European Union and Canada is awaiting ratification. It is noteworthy that no developing country is party to any such agreement. Typical provisions of many of these agreements include: notification of enforcement activities affecting the other party's important interests; commitments to take into account the other party's significant interests when investigating or applying remedies against RBPs (traditional comity); consultations to resolve conflicts between the parties' respective laws, policies and national interests; coordinated action in respect of related RBPs occurring in both countries; requests for assistance in investigations when RBPs on the territory of the party requested are adversely affecting the significant interests of the requesting party; requests for enforcement of an order by one party in the territory of another party; and commitments (subject to compatibility with national laws and important interests, and to the availability of resources) to give serious consideration to such requests for investigatory assistance or enforcement, including by providing non-confidential information and, in a few cases, confidential information (subject to safeguards). While the older agreements of this type are usually

more concerned with avoiding or managing conflicts between Governments arising out of enforcement proceedings (particularly where extraterritorial action is involved), the newer generation of agreements, while still concerned with avoiding conflicts, also often aim at collaborative international action against RBPs.

6. However, these two objectives of conflict avoidance and collaboration against RBPs may be interlinked. Some recent agreements, for instance, provide for "positive comity", under which requests by one country's competition authority to another country's authority to initiate or expand proceedings against RBPs originating in the latter's territory which adversely affect the first country's important interests should be seriously considered by the authority so requested. The response to such requests remains voluntary; conversely, the requesting country retains the right to initiate or re-institute its own enforcement. It is also expressly recognized in such agreements that parallel investigations may be appropriate where both markets are harmed. The first bilateral competition agreement to include positive comity provisions was the 1991 agreement between the United States and the Commission of the European Communities, which was complemented by the 1998 agreement between them (which does not apply to mergers), which introduces "enhanced positive comity", that is, a presumption that the competition authorities of an affected party will defer or suspend their own enforcement where its consumers are not directly harmed, or where the anti-competitive activities occur principally in and are directed principally towards the other party's territory (the United States federal enforcement agencies are bound by this agreement, but not the courts). Each party pledges to devote adequate resources and its best efforts to investigate matters referred to it and to inform the other side's competition authorities on request, or at reasonable intervals, of the status of the case. In practice, positive comity would appear to come into play mainly when the requesting party is seeking to protect its export trade, reducing recourse to extraterritorial action in such cases. While it would not be necessary for the *requesting* country's competition laws to be infringed for a request to be made, the *requested* country's competition laws would need to be infringed for action to be considered; thus, positive comity would not enable action to be taken against export cartels, for instance.

7. However, such a limitation may not necessarily apply to the provision of investigatory assistance. Under the International Antitrust Enforcement Assistance Act of 1994, the United States federal competition authorities are authorized (subject to reciprocity and not in the case of mergers) to conclude international agreements providing for the possibility of exchange of confidential information on a case-by-case basis (provided certain conditions are met), and to employ compulsory processes to acquire information at the request of a foreign competition authority whose important national interests are affected by anti-competitive behaviour organized within the United States, even if such behaviour is not illegal under United States law. The only agreement concluded so far on this basis is the 1997 agreement between the United States and Australia.

C. Bilateral agreements covering competition law

8. Antitrust cooperation in criminal cases can take place through bilateral mutual legal assistance treaties applying to criminal matters generally. Although the United States has concluded such treaties with a number of countries, the only one under which antitrust cooperation has taken place is the Treaty between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters (1990). This provides for, *inter alia*, the obtention of evidence regarding possible criminal offences (including through the use of compulsory processes such as search warrants) and sharing of confidential information (subject to safeguards relating to divulgation).

9. Friendship, commerce and navigation (FCN) treaties concluded between the United States and a number of other countries contain clauses relating to cooperation on competition law enforcement. Under the 1954 FCN treaty between Germany and the United States, for instance, each Government agrees to consult with the other, at the request of either, with respect to RBPs having harmful effects upon commerce between their respective territories, and to take such measures, not precluded by its legislation, as it deems appropriate to eliminate such harmful effects. However, it is now many years since treaties of this nature were concluded between the United States and other countries.

10. There are also bilateral agreements which organize technical assistance on competition law in the context of assistance on different forms of economic regulation. Under a 1992 technical cooperation agreement between the French Direction-Générale de la Consommation et de la Répression des Fraudes (DGCCRF) and the Direction-Générale de la Consommation (DGCN) of Gabon, for example, the two authorities undertake to cooperate in such areas as competition policy, consumer protection, unfair competition, product quality and safety, and price control. In the implementation of this agreement, the DGCN has sent personnel to centres run by the DGCCRF for short-term or long-term training, initially in price control, and now in competition law.

D. Free trade, customs union or common market agreements

11. These agreements, which are often of a regional nature may, depending on the degree of integration envisaged among the parties thereto, contain rights and obligations of varying strength and detail relating to, *inter alia*, the adoption or maintenance and effective enforcement of competition laws and policies; competition norms applicable to trade between the parties, sometimes with the concomitant exclusion of anti-dumping and/or countervailing duty trade remedies; substantial harmonization of competition laws; control of subsidies; control of discriminatory or other action by State enterprises or enterprises with special or exclusive rights; enforcement of common norms by supranational institutions; consultations on, and coordination of, enforcement between national and supranational institutions and among national institutions; dispute settlement; and technical assistance. 3/ A fundamental difference between such agreements and the types of bilateral agreements referred to above is that the former include substantive competition rules, rather than just procedural rules relating to cooperation. The most advanced regional system of competition rules is that of the European Union, which is also at the centre of a web of agreements with neighbouring countries

involving varying intensities of cooperation in competition law and policy. The system of cooperation within the European Union also appears to provide a model for some of the subregional groupings in Africa and Latin America, albeit with some variations. An alternative model is that created under the North American Free Trade Agreement (NAFTA), which provides for a much less intense degree of cooperation. Cooperation envisaged so far within the Asia-Pacific region is even less intense, except for the close collaboration between Australia and New Zealand in this area.

12. The European Union has supranational competition rules (relating to RBPs, to public undertakings and undertakings granted special or exclusive rights, and to subsidies), which are linked by the Treaty of Rome to the fundamental objective of establishing a common market. These rules apply to practices affecting trade between member States, even if they occur within a single European Union country or an area within a country. There is provision for: coexistence between national and European Union competition laws, subject to the primacy of European Union law; a system for allocating competence among European Union and national competition authorities and courts (who may also apply European Union law), aimed at balancing subsidiarity with the uniformity of the competition regime within the European Union; cooperation in the investigation or evaluation of practices; exchange of documents (including confidential information); representation at hearings; the communication of opinions on draft decisions for comments; and the provision by institutions of the European Union to national institutions of information or rulings on facts or European Union law. A step further in cooperation has recently been taken by the competition authorities of France, Germany and the United Kingdom, which have established a single form for the notification of mergers falling within the jurisdiction of at least two of these authorities. Anti-dumping or countervailing duty action among members of the European Union is precluded. Special sectoral arrangements are provided for under the Treaty Establishing the European Coal and Steel Community.

13. Under the Agreement on the European Economic Area (EEA), concluded by the European Union with most countries of the European Free Trade Area (EFTA), all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are virtually identical to European Union competition law. Either the European Commission or the EFTA Surveillance Authority have supranational authority over practices affecting trade within the area (there are rules for allocation of jurisdiction between them). There are provisions for the exchange of information (applying even to confidential information), consultations (including the communication of opinions by an authority in proceedings brought before the other authority), coordinated enforcement and dispute settlement; anti-dumping and countervailing duty action within the EEA is precluded. However, the accession of many former EFTA countries to the European Union has now reduced the practical scope of the Agreement on the EEA. As regards those EFTA countries not party to the EEA, there are procedures under free trade agreements for consultations and conciliation relating to practices affecting trade with the European Union.

14. Under the Europe agreements between the European Union and most Eastern European and Baltic countries, supplemented by implementing rules for

the application of the competition provisions applicable to undertakings and to State aid (implementing rules have not yet been adopted in some cases), competition standards based upon European Union competition rules are applicable where trade between the European Union and the other signatory is affected. In addition, the other signatories are bound to ensure the approximation of their existing and future competition legislation with European Union competition law (which is not required under EEA or even European Union rules), and their national legislation to implement the agreements needs to be approved by the association councils established under the agreements. Where cases fall within the competence of both parties, the European Union and the other party are to notify each other of any action envisaged (unless the transmission of information is prohibited by law or is incompatible with their respective interests); notification is also required where a case falling within the exclusive competence of one party would affect the important interests of the other party. Provision is made for consultations and the possibility of requests by one party to the other to take remedial action against RBPs having harmful cross-border effects. Consultation with the association councils is necessary before action can be taken against a practice deemed not to have been adequately dealt with. The Europe agreements make no provision for supranational competition authorities, and do not apply to trade among the Eastern European countries themselves (unlike among the EFTA members of the EEA). State aid may be granted to enterprises of the Eastern European countries concerned under rules similar to the European Union rules applicable to the least prosperous regions of the European Union. Conversely, exemptions are provided for the grant of State aid in connection with the Common Agricultural Policy or the Treaty Establishing the European Coal and Steel Community, or to practices which are necessary for the attainment of the objectives of these two instruments. Enterprises with special or exclusive rights cannot engage in practices enabling them to restrict trade or to discriminate between nationals of the European Union and those of the other countries. Each party must inform the other party before imposing anti-dumping or countervailing duty measures. Similar obligations have been extended to Cyprus and Turkey under free trade agreements.

15. Under the Euro-Mediterranean agreements, obligations similar to those under the Europe agreements, except in respect of the requirement to align competition rules, have been extended to trade between the European Union and several Mediterranean countries. Implementing rules for these Euro-Mediterranean agreements have not yet been adopted. Negotiations on other Euro-Mediterranean agreements are proceeding with other Mediterranean countries. Less far-reaching partnership and cooperation agreements have also been concluded between the European Union and countries of the Commonwealth of Independent States (CIS), under which the parties agree to work to remedy or remove restrictions on competition, whether caused by enterprises or by State intervention, and to enforce their competition laws, and the members of the CIS are to endeavour to ensure that their competition legislation is gradually made compatible with that of the European Union. The granting of export aid is restricted and further negotiations on other types of aid is provided for. Technical assistance is an important component of these agreements. Similar obligations limited to the energy sector are provided for under the Energy Charter Treaty concluded by the European Union with some members of the CIS. Even lower-intensity cooperation is provided for under a network of

framework cooperation agreements concluded between the European Union and its member States and, respectively, Argentina (2 April 1990), the Central American republics (1993), the member countries of the Andean Pact (21 January 1993), Brazil (29 June 1995), the Southern Common Market (MERCOSUR) (15 December 1995) and Chile (21 June 1996); in the context of provisions on cooperation in a broad range of areas, the parties agree to hold a regular dialogue on the monitoring of RBPs, to identify and eliminate obstacles to industrial cooperation by means of measures which encourage respect for competition laws, and to make resources available for these purposes. Negotiations are under way for the conclusion of free trade agreements with Chile, Mexico and MERCOSUR. Negotiations are also under way with the African, Caribbean and Pacific States (ACP) on the promotion of competition policy and on cooperation in this area, both among ACP States and between them and the European Union.

16. While the European Union is at the centre of agreements with all of these countries or regional groupings, agreements have also been concluded among some of the countries which are party to agreements with the European Union. The EFTA countries not party to the EEA have available long-standing procedures for mandatory consultations and dispute settlement relating to practices affecting trade among EFTA countries. Free trade agreements with competition provisions have also been concluded by some EFTA countries and by Israel with some Eastern European countries, as well as within this latter group of countries, under the Central European Free Trade Agreement (which provides for general information exchange and notification of individual cases). Cooperation agreements on anti-monopoly matters have been concluded by Poland with Ukraine (December 1993) and with the Russian Federation (March 1994). The CIS has also agreed, in the context of the creation of an economic union among its members, to create conditions for fair competition, including a mechanism for anti-monopoly regulation. An agreement on the conduct of an agreed anti-monopoly policy has now been signed; the Coordination Council of the Anti-monopoly Agencies monitors its implementation, and provides a mechanism for exchanging experiences and for assisting in the improvement and the implementation of national legislation. But all the agreements to which the European Union is not a party tend to involve relatively weaker rights and obligations.

17. Competition law and policy is starting to be addressed more extensively in African subregional agreements, often on the basis of the model of the Treaty of Rome. The 1964 Brazzaville Treaty Establishing the Central African Customs and Economic Union (UDEAC), already provided that means should be found to achieve the progressive elimination of RBPs in trade among member States. The Treaty Establishing the Economic and Monetary Community of Central Africa (CEMAC) which, when in force, will replace the UDEAC treaty, provides for the establishment of common competition rules to control both RBPs and governmental activities; two draft regulations dealing respectively with these two subjects, are currently being elaborated. In pursuance of the Treaty on the Harmonization of Business Law in Africa, it is also proposed to elaborate and adopt a uniform act dealing with competition law, which would have direct legal effect on the territory of its 16 member States from West and Central Africa. 4/ Under the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), the member States agree, in terms similar to article 85 of the Treaty of Rome, to prohibit RBPs which have as

their object or effect the prevention, restriction or distortion of competition within the Common Market, with a proviso for the granting of exemptions by the COMESA Council. The Council is to elaborate regulations on competition within member States. Subsidies distorting competition which affect trade among member States are also prohibited, subject to some exceptions. The Southern African Development Community (SADC) has agreed that member States shall implement measures within the Community that prohibit unfair business practices and promote competition.

18. In the Latin American region, the 1973 Treaty Establishing the Caribbean Community (CARICOM) is relatively cautious in its approach. The member States recognize that certain practices (defined along the lines of articles 85 and 86 of the Treaty of Rome), are incompatible with the Caribbean Common Market insofar as they frustrate the benefits expected from the trade liberalization required by the CARICOM Treaty. If any such practice is referred to the CARICOM Council, it may publish a report on the matter. The Council is to consider whether further provisions dealing with RBPs are necessary; no such provisions have been adopted so far. Member States also undertake to introduce as soon as practicable uniform legislation for controlling RBPs, giving particular attention to practices affecting intra-CARICOM trade. State aid affecting subregional trade is also prohibited (subject to specific exceptions), as are trade-restricting or discriminatory practices by public enterprises. More recently, MERCOSUR has adopted a protocol on competition policy proscribing individual conduct or concerted agreements impeding, restricting or distorting competition or free access to markets or abusing a dominant position in a relevant regional market within MERCOSUR and affecting trade between its member States. The MERCOSUR Technical Committee on Competition Policy and Commerce Commission may issue orders to enforce these norms, which would be implemented by national agencies of the member countries, with limited supranational supervision. Common norms to control anti-competitive acts and agreements are expected to be completed soon, and national competition agencies are to adopt measures to enhance cooperation in such areas as information exchange, training and joint investigations. A dispute-settlement system has been set up. The treatment of anti-dumping within MERCOSUR is to be discussed in 2000. Decision 285 of the Commission of the Cartagena Agreement (established under the Andean Pact) also provides for the prevention of, or remedies against, distortions to competition resulting from RBPs. However, unlike MERCOSUR, Andean Pact institutions have supranational powers; member States or any enterprise with a legitimate interest may request the Board of the Cartagena Agreement for authorization to apply measures to prevent or correct the threat of injury or injury to production or exports, and which are a consequence of RBPs, and the Board's orders have direct effect in member States' legal orders. Anti-dumping action or countervailing duty action among Andean Pact countries is regulated but not precluded.

19. The North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico provides for each party to adopt or maintain measures to proscribe or take action against RBPs, to consult with the other parties on the effectiveness of such measures, and to cooperate on enforcement issues, including through mutual legal assistance, notification, consultation and the exchange of information on enforcement in the free trade area. However, detailed procedures for cooperation are not set out, and recourse to dispute

settlement in competition policy matters is excluded. There are also provisions that state that monopolies or State enterprises should not operate in a manner which is inconsistent with the Agreement, nullifies or impairs its benefits, or discriminates in the sale of goods or services. A working group has been established to report on relevant issues concerning the relationship between competition law and trade polices in the free trade area. Similar provisions are contained in the free trade agreement between Canada and Chile, although this agreement goes one step further by abolishing the application of anti-dumping trade measures to conduct affecting trade between the parties; instead, competition laws are applied to such conduct. The so-called "G3 Agreement" between Mexico, Colombia and Venezuela is more limited applying only to State-owned monopolies; these are to act only on the basis of commercial considerations in operations on their own territories, and may not use their monopoly positions to use RBPs in a non-monopolized market in such a way as to affect enterprises in the other member States. A mechanism for cooperation in competition policy has now been created in the context of discussions on the establishment of a free trade area for the Americas. The communiqué adopted on 20 October 1998 at the first Antitrust Summit of the Americas, which was attended by most of the countries in the region that have competition laws, affirms that participating countries plan to cooperate with one another, in accordance with their respective laws, to improve enforcement, to disseminate best practices in this area (with the emphasis on institutional transparency), to encourage efforts by small economies in the region that do not yet have solid competition regimes to complete the development of their legal frameworks, and to advance competition principles in the Negotiating Group on Competition Policy of the Free Trade Area of the Americas. 5/

20. A similar forum for exchanges of views, technical cooperation and discussion of competition issues has been established under the auspices of the Asia-Pacific Economic Cooperation Forum (APEC), whose members have undertaken (in a legally non-binding instrument) to introduce or maintain effective, adequate and transparent competition policies or laws and enforcement, to promote competition among APEC economies, and to take action in the area of deregulation. Such low-intensity cooperation contrasts with that between Australia and New Zealand, which no longer apply their anti-dumping laws to conduct affecting trade between them and instead apply their competition laws relating to predatory conduct by dominant firms (which have been harmonized). For the purpose of enforcing this, each country's competition authority and courts have "overlapping jurisdiction" - complaints may be filed before them, hearings held, and valid and enforceable subpoenas and remedial orders issued in the other country. Separately, a bilateral enforcement agreement provides for extensive investigatory assistance, the exchange of information (subject to rules on confidentiality), and coordinated enforcement.

E. Multilateral and plurilateral instruments

21. The sole universally applicable multilateral instrument in this area is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, negotiated under the auspices of UNCTAD. The numerous instruments formulated by the Organization for Economic Co-operation and Development (OECD) that cover competition law and policy

(listed in annex 3) apply only to a restricted group of countries, although the recommendation concerning effective action against hard-core cartels states that it is open to non-OECD member countries to associate themselves with this recommendation and to implement it (and several such countries have indicated interest in associating themselves 6/). The Set of Principles and Rules and the OECD instruments contain many of the types of provisions adopted in bilateral enforcement cooperation agreements and in free trade, customs union or common market agreements, but with variations, omissions or additional provisions, particulary in the case of the Set. The Set of Principles and Rules, like the OECD instruments, is concerned with the adverse impact of RBPs on international trade, but is, in addition, concerned with their impact on development. A unique feature of both the Set and the 1976 and 1978 OECD instruments is that they not only recommend norms to be followed by Governments, but also rules for the conduct of enterprises, with a particular focus on transnational corporations. Both also provide for the adoption or maintenance and effective enforcement of competition laws and policies, and recommend competition norms of a general nature to be applied by member States. The Set also provides for work aimed at achieving common approaches in national policies relating to RBPs compatible with the Set (article F.1), and continued work on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation (article F.2); the OECD instruments do not have such provisions, but the 1998 OECD recommendation recommends convergence in (as well as effective enforcement of) laws prohibiting hardcore cartels. While the Set deals solely with RBP control, the 1986 OECD instrument is also concerned with the interface between competition policy and trade measures; it recommends that policy makers should, when considering a prospective trade measure or reviewing existing measures, evaluate their likely effects, including the impact on the structure and functioning of the relevant markets, and it suggests a checklist of the main effects of trade measures, including competition effects. The OECD has also adopted instruments dealing with competition-promoting regulatory reform.

22. The Set of Principles and Rules and the OECD instruments all provide for cooperation on enforcement, the OECD instruments having influenced or been inspired by the bilateral enforcement agreements concluded among OECD countries. The 1995 OECD recommendation (which replaces a long series of instruments recommending progressively closer cooperation) provides for notification, consultations, the exchange of non-confidential and confidential information (subject to safeguards), the coordination of investigations, investigatory assistance, traditional and positive comity, consultations and a conciliation mechanism to resolve disputes. The 1998 recommendation encourages cooperation and comity specifically in respect of enforcement against hard-core cartels, and provides for transparency and periodic reviews relating to exempted cartels. The Set also provides for consultations (envisaged both within and outside UNCTAD) and the exchange of non-confidential and confidential information. In addition, the Set contains the following provisions: States should take due account of the extent to which the conduct of enterprises is accepted under applicable legislation (article C.6); States, particularly developed countries, should, in controlling RBPs, take into account the development, financial and trade needs of developing countries, particularly the least developed countries (article C.7); and States should seek appropriate measures to control RBPs

within their competence when it comes to their attention that RBPs adversely affect international trade, particularly the trade and development of developing countries (article E.4). The Set makes no provision for dispute settlement; the Intergovernmental Group of Experts or its subsidiary organs are proscribed from acting like a tribunal or otherwise passing judgement on the activities or conduct of individual governments or enterprises in connection with specific business transactions (article G.4). An important component of the Set not present in the OECD instruments is the provision of technical assistance to developing countries, both by countries with greater expertise in this area and by UNCTAD.

23. Unlike the Set and the above-mentioned OECD recommendations, the Uruguay Round agreements are legally binding, and are backed by strong dispute settlement mechanisms. Different provisions with a bearing on competition law and policy are included in, *inter alia*, the articles or agreements dealing with: State enterprises and enterprises with exclusive rights; anti-dumping; subsidies; safeguards; trade-related aspects of intellectual property rights (TRIPs); trade-related aspects of investment measures (TRIMs); and trade in services, particularly telecommunications and financial services. Those provisions of a substantive character are not reviewed here in detail, as they have already been covered in a previous study by the UNCTAD secretariat. 7/ Instead, an analysis is undertaken in terms of obligations relating to consultations, the exchange of non-confidential and confidential information, and positive comity. Apart from the general consultation procedures applicable to all WTO-related disputes, special consultation procedures are provided under: (a) the GATT Decision on Arrangements for Consultations on Restrictive Business Practices of 18 November 1960; 8/; (b) the TRIPs Agreement, whereby a WTO member considering competition enforcement against a firm of another member can seek consultations with that member, aimed at securing compliance, while a country whose firms are subject to such action may also ask for consultations; and (c) the General Agreement on Trade in Services (GATS), in respect of certain business practices by a monopoly supplier of services and an exclusive supplier. The latter two agreements also provide for the exchange of non-confidential information and, subject to domestic laws and a satisfactory agreement concerning the safeguarding of confidentiality of confidential information. A degree of positive comity is provided for under the 1960 Decision; the party to whom a request for consultations is addressed shall, if it agrees that such harmful effects are present, take such measures as it deems appropriate to eliminate these effects. The label of positive comity might also be attached to the obligation on contracting parties under article XVII of the General Agreement on Tariffs and Trade (GATT) 1947 (now incorporated in GATT 1994) to ensure that State enterprises or private enterprises with exclusive rights act in a non-discriminatory manner in importing or exporting goods, and in particular to the GATS obligations to control certain practices by monopoly suppliers of services and exclusive service suppliers (backed by more detailed obligations in the areas of telecommunications and, to a lesser extent, financial services).

Chapter II

ENFORCEMENT COOPERATION

A. Overview

24. Enforcement cooperation has, in cases with international implications, helped to improve the quality and effectiveness of enforcement, and decrease its cost, helping to resolve difficulties in obtaining access to information held in other countries, in serving process or in undertaking enforcement against entities whose headquarters or assets are located abroad. It has also reduced friction that might arise between countries because of recourse to extraterritorial enforcement of competition laws or of jurisidictional conflicts. However, difficulties are sometimes experienced in implementing such cooperation. It takes place primarily between developed countries in the application of bilateral enforcement agreements, mutual legal assistance treates (limited to criminal action aginst cartels), free trade, customs union or common market agreements, and the relevant OECD instruments. There is no evidence that FCN treaties have been utilized as vehicles for cooperation. 9/ And, while the maintenance of informal links with other competition authorities has been an important way of keeping informed of developments in competition law and policy in other jurisdictions and in exchanging views, such informal cooperation has been found to be of limited usefulness where an authority requires enforcement assistance in a particular matter, or confidential information. 10/ The bilateral cooperation experiences of the European Union and the United States are reviewed below; the impediments to cooperation, as well as factors conducive to cooperation, are identified; and some suggestions are made as to how developing countries might play a more prominent role in enforcement cooperation, using the frameworks provided by regional groupings and by the Set of Principles and Rules.

B. Cooperation between the European Union and the Unites States

25. The effect of the 1991 Agreement between the European Union and the United States was to stimulate a spirit of cooperation among the competition authorities of both jurisdictions; even though much of the cooperation undertaken in the implementation of the Agreement could have taken place before, it spurred the competition authorities concerned to "seek opportunities for cooperation in a more structured and proactive way". 11/ The Agreement has been a vehicle both for exchanging information and views on enforcement policy developments, and for cooperation in individual cases. There is now routine notification of cases which concern the important interests of the other party. 12/ Successive notifications may occur in the same case; in a merger case, for example, notification may be undertaken at the outset, again when the decision is taken to initiate proceedings, and again before the final decision is taken, far enough in advance to enable the other party's views to be taken into account. Where both the European Union and United States authorities undertake proceedings in respect of the same transaction, there is coordination of enforcement activities, which may involve the exchange of information and discussions on the following: the timing of their respective procedures; the delimitation of relevant markets (mainly product markets, discussions on geographical markets being limited because each authority is concentrating on effects on its own market); the

anti-competitive effects of transactions; remedies that might be envisaged and the avoidance of conflict between them; and the law of, and publicly available facts in, the other jurisdiction. In one recent case, there has been successful synchronization of investigations and searches, thus avoiding the risk of destruction of evidence in the other jurisdiction. 13/ Even where these authorities take different views on certain points, such contacts have enabled them to understand each other's thinking and refine their analyses accordingly. However, in merger cases, differing deadlines for review have limited the scope for cooperation, although useful results have still been obtained.

26. The main obstacle to coordinated enforcement has been that it can often only be based on exchanges of non-confidential information, unless the enterprises concerned have waived their objections to the exchange of confidential information. Such waivers have been granted only where it is in the interests of the enterprises to do so, and enterprises are often reluctant to allow information to be shared if it might disclose RBPs and expose them to sanctions in both jurisdictions. No waivers have so far been provided in cartel investigations. Where enterprises have been prepared to waive their objections to the exchange of confidential information, this has facilitated a successful outcome. In the Microsoft case, for instance, such a waiver enabled the European Union and United States authorities to coordinate their investigations in respect of similar practices by a dominant computer software firm in both jurisdictions, and this contributed to similar settlements being reached, despite substantive differences in competition laws. 14/ However, even the exchange of non-confidential information has helped to draw attention to possible anti-competitive behaviour, improved the handling of cases and contributed to similarity in the analyses undertaken by the different authorities and the compatibility of remedies.

27. Such cooperation has not always made it possible to avoid conflicting views or to reach commonly accepted solutions, because of differences in laws, in economic doctrines, in the effects on each market, or in the evidence available in each jurisdiction. In the Upjohn/Pharmacia merger, for instance, the European Commission cleared a merger, but the United States Federal Trade Commission required the divestiture of some United States assets; similarly, the Ciba-Geigy/Sandoz merger was cleared by the European Commission, but the Federal Trade Commission, considering that the "innovation market" would be adversely affected, ordered the licensing of gene therapy rights and other technology (the concept of an "innovation market" is not used in the European Union, and there are differences in the scope of intellectual property rights in each jurisdiction). 15/ On the other hand, in the Boeing/MDD case, involving the merger of two United States aircraft manufacturing companies, the Federal Trade Commission cleared the merger, but the European Commission intervened because it considered that the merger would give the companies concerned a strengthened position of dominance in the market for large aircraft. However, in this situation, traditional comity came into play to some extent; the European Commission took into account, to the extent consistent with European Union law, concerns expressed by the United States Government relating to important United States defence interests and to the undesirability of divestiture, limited the scope of its action to the civil side of the companies' operations, and approved the merger subject to a number of conditions, which did not include divestiture. As regards

positive comity, it has normally been possible to take into account concerns expressed in an informal manner, with one party simply deferring its investigations while awaiting the outcome of investigations in the other jurisdiction, being kept informed of progress and being provided with the opportunity to comment on the proposed remedy. This happened, for example, in the A.C. Nielsen case (involving abuses of dominance in the contracting practices by a United States firm providing retail tracking services, which may have been adversely affecting exports to Europe by its competitors based in the United States. 16/ Positive comity procedures have so far only been formally activated once; the United States Department of Justice has asked the European Commission to investigate allegations that a computerized reservation system set up by three European airlines was operated in an anti-competitive manner to prevent computerized reservation systems based in the United States from competing in European markets; the case is under investigation by the European Commission in cooperation with the Department of Justice. Dissatisfaction has been expressed by some members of the United States Congress with the operation of positive comity, because it is considered not to have led to improved market access for United States exports so far; United States business people have also alleged that there have been delays in investigations by the European Commission, that there are insufficient powers to compel the discovery of documents, and that evidentiary standards are too high. However, the Department of Justice has expressed confidence in the quality of European Union enforcement, and has stated that positive comity will need time to work, even if it may not have immediate success, and is better than the alternative. 17/ The Federal Trade Commission has also stated that disagreements are the exception rather than the rule, and that there is a "slow but steady convergence of review and mutual respect" between the United States and European Union. 18/

C. Impediments and factors conducive to cooperation

28. As appears from the above, cooperation is facilitated by a degree of commonality of approach; differences in substantive competition laws or doctrines, enforcement practices or procedures, or interpretations of the underlying facts may all constitute impediments. Differences in legal doctrines relating to extraterritoriality may also adversely affect cooperation; while the strengthening of cooperation between the European Union and the United States may have been facilitated by the assertion by the European Union of jurisdiction based on "objective" territoriality 19/ (which has some similarities with extraterritorial jurisdiction based upon the "effects doctrine" asserted by the United States), substantial differences still persist, 20/ and the view has been expressed that the fundamental objection of the United Kingdom Government, and many others, to the extraterritorial enforcement of United States antitrust law has significantly limited the cooperation possible. 21/ Cooperation may also be limited by concerns about having enforcement priorities and resource allocation determined by positive comity requests from other countries, or exposing national firms to sanctions by a foreign authority. Thus, the Canadian competition agency has not yet been able to obtain legislative authority to exchange confidential information with foreign authorities in civil competition cases, because of serious concerns in the business community about the possibility of information provided to Canadian officials becoming the basis for major civil suits in the United States 22/ (even though, in

pursuance of the mutual legal assistance treaty between the two countries, there is extensive cooperation in criminal antitrust cases which may involve, as in the "Fax Paper" cases, 23/ the sharing of documents obtained by compulsory processes, access to databases, joint interviewing of witnesses and analysis of documents, and coordinated plea negotiations 24/). Reciprocity would also be a concern. As noted in chapter I, it is a requirement, for instance, under the provisions of the United States International Antitrust Enforcement Assistance Act of 1994. The German authorities have suggested that reciprocity and the "earmarking" of confidential information, as well as the justified interests of the companies concerned, should be taken into account in concluding cooperation agreements and that such agreements might initially be limited to those countries that have secrecy regulations themselves, guarantee the fulfilment of those regulations and choose to cooperate. 25/ Cooperation may also be hampered by perceptions of national industrial or trade policies influencing competition decisions, or inspiring leakage of confidential information - a senior official of the European Union has suggested that a lesson from the Boeing case is that successful cooperation depends on rigorous economic analysis based on strictly legal rules, and that issues of trade policy should not be allowed to become entwined with competition issues when scrutinizing transactions, 26/ while a senior official from the Department of Justice, discussing enforcement against international cartels, has stated that the greatest impediment to cooperation is the fear, or the suspicion, that evidence will be used for trade purposes. 27/ While the trend towards greater convergence in this area 28/ may help to reduce such considerations and concerns, they will not disappear, since what may maximize welfare in one country may reduce it in another.

29. Competition law and policy have also been linked more directly to trade issues. A version of positive comity (in terms of competition advocacy rather than enforcement) has operated with some success on an informal level between the United States and other countries. First within the context of the Structural Impediments Initiative in 1989, and then through the Deregulation and Competition Policy Working Group set up under the Framework for a New Economic Partnership in 1993, the United States has strongly encouraged a more stringent competition policy in Japan, especially in instances where it perceived anti-competitive activity as impeding competition from foreign products. 29/ Similar initiatives have been taken through the Competition Policy Working Group set up within the context of the Dialogue for Economic Cooperation between the United States and the Republic of Korea. As a result, the Republic of Korea decided to strengthen its competition law and enforcement, apply competition principles in deregulation, improve access to television and radio advertising slots, address RBPs by industry associations and revise regulations and guidelines that might impede pro-competitive activities. 30/ In a recent case, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes was invoked by the United States in relation to alleged Japanese measures affecting the distribution and sale of imported consumer photographic film and paper (contrary to GATT 1994), as well as a number of measures allegedly affecting distribution services in general (contrary to GATS); consultations were also requested by both the United States and Japan, in pursuance of the 1960 GATT Decision, in respect of alleged RBPs affecting imports of photographic film and paper into each other's markets (the European Union also

asked to join in these consultations). The procedures under GATS and the 1960 Decision were suspended, while the complaint under GATT 1994 was rejected by the Dispute Settlement Panel. 31/

30. It is therefore likely that countries will be prepared to cooperate voluntarily only if there is a shared perception of common interest and mutual benefit. This may be one reason why enforcement cooperation agreements leave such a large measure of discretion to the parties as to whether or not to cooperate in individual cases. It may also help to explain why some free trade agreements exclude competition law and policy issues from the purview of dispute settlement, and why the conciliation machinery provided for in successive OECD recommendations on this subject has not so far been resorted to (although, in 1987, the OECD Committee of Experts on Restrictive Business Practices took the view that this was mainly because the notification, exchange of information and consultation procedures provided for had been effective in avoiding or resolving conflicts). 32/ The difficulty of enforcing these agreements may in fact facilitate their conclusion, and the potential impediments to cooperation identified above would be weighed against the benefits from the conclusion or further development of enforcement cooperation agreements. Thus, a senior official of the European Commission has called for the conclusion of "second-generation" cooperation agreements making it possible to share confidential information and use compulsory process on behalf of other countries; this official does not accept that concerns relating to differences between competition rules and to risks that confidential information might be used in a way which harms European interests should prevent this, as the experiences of existing cooperation between the European Union and the United States show that the views of the parties are more often likely to coincide than to differ, as differences between rules are less important in the case of the most serious infringements (particularly in the case of hard-core cartels and the most serious abuses of dominance) and as discrepancies between rules in other areas have not precluded effective cooperation. 33/ The same official has expressed the view that a key ingredient in successful enforcement cooperation is mutual confidence in enforcement capabilities and in respect for confidentiality, arising from a shared commitment to upholding the competitive process. 34/ Building up such mutual confidence requires a progressive approach. It has been suggested that after starting with a simple cooperation agreement, countries could evolve to more complex agreements involving the exchange of confidential information as confidence and a tradition of cooperation is built up, increasing the level of both obligation and mutual benefit, and that the extent and intensity of cooperation would depend on institutional capabilities, the actual experience of cooperation and the degree of trust built up over time. 35/ Even agreements which might not be regarded as optimal by all parties may pave the way for further agreements. For instance, before the 1997 Agreement between the United States and Australia was concluded, the view was expressed that the 1982 Agreement between the two countries was one-sided, but that the experience of its implementation had provided a more conducive environment for expanding cooperation. 36/ For the purpose of strengthening enforcement cooperation, it has been suggested that developing common standards was important, and that a balance between transparency and the protection of confidential information should be found, as an international consensus on the latter would facilitate the conclusion of agreements featuring close cooperation between enforcement authorities. 37/

D. Developing countries, regional groupings and the Set of Principles and Rules

31. Developing countries have not so far significantly participated in enforcement cooperation. In the *French/West African Shipowners' Committees* 38/ case, for instance, the European Commission brought a case against cartels or exclusionary abuses by liner conferences or shipowners' committees with dominant positions in the maritime traffic between Europe and 11 west and central African States. In its decision, which had pro-competitive effects in the countries concerned, 39/ the Commission indicated that it was ready to enter into talks with the authorities of these countries with a view to helping their carriers secure a greater share of the traffic generated by their external trade. However, it appears that, prior to taking its decision, the Commission had not consulted with the African countries concerned, most of which did not have functioning competition laws or institutions at that time, and whose shipping authorities had in fact authorized cargo reservations by the shipping companies concerned. The circumstances were similar in the *CEWAL Liner Conference* case, involving traffic to Angola and the Congo. 40/ Enforcement cooperation between the European Union and the countries concerned might not only have led to traditional comity coming into play, but might have facilitated data-gathering by the Commission (it took five years for the Commission to take a decision in the *Shipowners'* case). To the extent that enforcement cooperation is not strengthened, there is also a higher risk that, as developing countries become more active in this area, firms will have to deal with the procedures and possibly inconsistent orders of several jurisdictions - as happened in the *Gillette/Wilkinson* case (where a proposed merger was examined in 14 jurisdictions, including Brazil and South Africa). 41/ Conversely, assistance with information-gathering and enforcement in relation to RBPs originating overseas and affecting their markets would be a major potential benefit for developing countries entering into enforcement cooperation agreements - for example, in two cases in the United States where international cartels for lysine (an ingredient in animal feed) and citric acid were successfully prosecuted, the Department of Justice discovered evidence of price-fixing and market allocation relevant to other countries, but could not share such evidence with those countries which were not party to antitrust cooperation agreements with the United States. 42/

32. The time is now ripe for change. The majority of developing countries have adopted or are in the process of drafting competition laws, and this trend is continuing. Fully effective implementation of all such competition laws will take time, depending on a gradual learning process, but progress is being made. The initiation and progressive practice of enforcement cooperation would both enhance effective implementation of competition laws and prepare the ground for more advanced cooperation. Enforcement cooperation among developing countries with limited experience in this area, but facing similar circumstances, may be of a more balanced character than cooperation with countries with more experience in this area, and would also constitute a learning experience, ensuring that cooperation with more advanced partners is fruitful.

33. While the eventual conclusion of bilateral enforcement cooperation agreements would be necessary for full cooperation to take place, enforcement

cooperation might initially take place on an informal basis. This would be facilitated by the initiation of informal discussions and exchanges of general information, including within the framework of any free trade, customs union or common market agreements to which the countries concerned are party. Within regional or subregional groupings, political will or relative uniformity of economic development and culture may make it easier to build up mutual trust and perception of common interests (which may be looked at within the context of the overall relationship rather than just in terms of competition law and policy).

34. There is little evidence that developing countries party to such agreements have so far taken advantage of them either to undertake enforcement cooperation or to prepare the ground for it. Direct use of free trade or common market agreements for enforcement cooperation appears so far to have taken place only within the European Union or the EEA, but they have in other cases provided a framework conducive to bilateral cooperation. Within NAFTA, for example, the Working Group on Competition has so far focused on studying members' competition laws, as well as transborder cases. The Mexican competition authority has also had extensive bilateral consultations with the Canadian and United States authorities on technical aspects of applying competition law and on specific cases, including cases involving RBPs with a transborder dimension (cases with implications for other member countries are notified). 43/ Even within regional groupings, however, enforcement cooperation may be limited by some of the concerns and differences highlighted above, by the fact that regional institutions or mechanisms are not adapted for enforcement cooperation, or simply because trade is limited between some countries in the grouping or RBPs affecting such trade are rare. It is therefore likely that, at least initially, cooperation will develop in an asymmetrical manner among different member countries within regional groupings. Within MERCOSUR, for instance, there may be little incentive to open and conduct investigations when trade interests are involved, given the relative institutional weights of the regional Committee for the Defence of Competition and the Commerce Commission; it has also been suggested that problems may arise from ambiguities in the definitions of RBPs and in institutional mandates, as well as from asymmetries among member States in terms of the adoption and implementation of competition laws. 44/ While several agreements between competition authorities of MERCOSUR member States have been concluded, providing for procedures for reciprocal consultations and technical assistance, linkages have so far been generated mainly between the Argentine and Brazilian authorities, helping to unify criteria applied by the two authorities. 45/ Within the Andean Pact, it has been suggested that the requirements for proving RBPs within the definitions provided in decision 285, as well as the lack of enforcement power of the Andean Board, explain why Andean Pact competition legislation and case law have not developed as fast as that of member countries. 46/

35. To realize the potential of regional groupings in this respect, therefore, some reflection would be appropriate as to which substantive competition regimes, institutional structures and mechanisms would promote cooperation. For this purpose, consultations might be undertaken within UNCTAD on how to maximize utilization of regional frameworks for enforcement cooperation. This would be in line with the Set of Principles and Rules, which provides for the establishment of appropriate mechanisms at the regional

and subregional levels to promote the exchange of information on RBPs and on the application of national laws and policies in this area, and to provide mutual assistance in RBP control (article E.7). The framework established under the Set might also be used more directly to further enforcement cooperation. So far, the consultation mechanisms provided for in the Set have mostly been used, with success, for presentations, the exchange of experiences and discussions on different competition issues. In one case in the mid-1980s, a developing country, using the UNCTAD secretariat as an intermediary, requested consultations with a developed country regarding the prohibition by one of its pharmaceutical firms of exports from a neighbouring developing country of pharmaceuticals manufactured under a licence granted by the firm. The matter was referred by the authorities of the developed country to the firm in question, and its reply explaining the circumstances of the prohibition was transmitted to the developing country (the matter was brought to the attention of the Intergovernmental Group of Experts on Restrictive Business Practices during informal consultations). It might be worth exploring the potential for further case-specific consultations of this type, which might be stimulated by a practice of notification of enforcement activities affecting the important interests of other States party to the Set. The aim would be to reinforce or promote cooperation under bilateral or regional agreements, rather than to replace such cooperation, since enforcement cooperation under non-binding OECD instruments tends to be less intensive and case-oriented if not backed up by a binding bilateral agreement. 47/

36. Such case-specific enforcement cooperation would not be at the expense of other forms of cooperation, but would rather aim to link with and build on them in a synergistic manner. There are extensive contacts among competition authorities for the purpose of exchanging general information, experiences or ideas; such contacts take place either on an informal basis or in pursuance of bilateral or regional agreements, as well as under the Set of Principles and Rules and under OECD instruments. 48/ Substantial technical assistance also takes place, in the form of: seminars and training courses; visits to, or training attachments with, competition authorities in developed countries; short-term missions to countries needing cooperation, including analyses of their situation and needs, workshops, group training, assistance on particular issues or in the drafting of legislation; and long-term secondments of personnel from authorities with experience in this area for the purposes of training and giving advice to the authorities of countries with limited experience. The European Commission, for example, has arranged study visits and responded to numerous requests for information from several competition authorities, and has assisted in the preparation of a compendium of Latin American competition laws, a list of national authorities, the joint publication of a Latin American competition bulletin (posted on the Internet), a list of the technical cooperation needs of many Latin American countries and subregional organizations, and a proposed biennial programme of technical assistance for MERCOSUR that includes a section on competition. 49/ To the extent that the communication of experiences or provision of technical assistance by one or more countries induces other countries to adopt or amend competition legislation or modify enforcement policies or procedures along similar lines, this promotes "soft" convergence (in contrast to the varying degrees of convergence or harmonization provided for in this area by free trade, customs union or common market agreements). It has been suggested that

"one advantage of convergence by learning and imitation is its flexibility; if a particular approach does not work out in the circumstances of a country's economic system, it can be modified or even abandoned". 50/

37. Yet, as indicated above, some degree of commonality is necessary in this area for enforcement cooperation to be successful, and there is a risk in particular of some lack of coherence among national competition regimes, and between national and different levels of regional competition regimes. A study on CEMAC, for instance, highlights such impediments to the implementation of a regional competition policy as the inadequate implementation of competition laws at the national level (in those member countries which have such laws), and the lack of compatibility between the objectives of these laws and the proposed regional regulation on competition policy. 51/ It therefore suggests the establishment within the CEMAC secretariat of a special consultation mechanism to manage the transition to the entry into force of the regulation, to be eventually replaced by a regional competition board, which would focus on investigating and analysing those RBPs which hamper the development of trade within the subregion (in the transport sector for instance). It also recommends that efforts should be made to ensure compatibility between the proposed CEMAC regulations and national sectoral policies (including structural adjustment policies agreed upon with international financial institutions), the uniform act to be adopted under the Treaty on the Harmonization of Business Law in Africa (some of the member States of the Organization for the Harmonization of Business Law in Africa are signatories of CEMAC), and the provisions of the treaty to replace the Lomé Convention. Regarding these recommendations, it might be noted that any provisions relating to competition policy within African or Caribbean subregional groupings, or in a post-Lomé treaty, would presumably (as in the Euro-Mediterranean agreements), apply only to practices affecting trade within or between regions, and not to practices having effects solely within national borders. Within the European Union itself, some countries have maintained national competition regimes significantly different from that of the European Union (Italy, for instance, did not even have a competition law until 1990), although the trend is towards convergence. Nevertheless, as indicated in chapter I, there is no hard and fast line between practices affecting individual countries and those affecting a region, and it may not be easy for ACP countries which have little experience in this area to maintain separate regimes for national, subregional and interregional transactions. Nor might this be conducive to trade or direct foreign investment. Thus, it may be appropriate to undertake consultations within UNCTAD on how to ensure compatibility, coexistence and mutual reinforcement among national, subregional and interregional competition regimes. This would involve discussing how much convergence between competition laws and policies is necessary to further enforcement cooperation, and what the appropriate balance would be between promoting such convergence and allowing room for diversity and experimentation by each country or subregional grouping to work out what is appropriate for its needs. It may be noted in this connection that the competition authorities of Gabon, which is a signatory to the CEMAC treaty, have suggested that UNCTAD might help to ensure the conformity of the practices of regional and subregional States with competition principles. Such consultations could provide a useful input to the ongoing discussions or possible future negotiations within WTO on the interaction between trade and competition policy.

Notes

1/ See paragraph 5 (c) of the agreed conclusions in annex I of the Report of the Expert Meeting on Competition Law and Policy (TD/B/COM.2/9-TD/B/COM.2/EM/12).

2/ See paragraph 7 (a) of the Agreed Conclusions in annex I of the Report of the Intergovernmental Group of Experts on Competition Law and Policy (TD/B/COM.2/13-TD/B/COM.2/CLP/5). Replies to the note verbale of the Secretary-General of UNCTAD requesting information on international cooperation and on technical assistance in this area were received from the Governments of Azerbaijan, Bulgaria, Burkina Faso, Finland, Malta, Slovakia and Sweden, as well as from the Economic Commission for Africa and the European Commission. Account was also taken of the replies received to the note verbale sent in preparation for the preliminary report from the Governments of Australia, Belgium, Botswana, Dominica, France, Gabon, Germany, Italy, Kenya, Lithuania, Mexico, Morocco, Niger, Pakistan, Poland, Portugal, the Republic of Korea, Spain, Sweden, Thailand, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela and Zimbabwe, as well as from the European Commission and the World Trade Organization.

3/ This categorization follows to some extent that adopted in World Trade Organization, *Annual Report 1997*, Vol. 1, *Special Topic: Trade and Competition Policy*.

4/ See Price Waterhouse Fidafrica, *Le nouveau droit des affaires en Afrique - OHADA*, Paris, 1997.

5/ See "FTC and DOJ publish communique from first "Antitrust summit of the Americas", *Antitrust & Trade Regulation Report*, 8 October 1998, vol. 75, p. 416.

6/ See WTO Working Group on the Interaction between Trade and Competition, "Policy report on the meeting of 11-13 March 1998" (WT/WGTCP/M/4), paragraph 57.

7/ "The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round agreements relevant to competition policy, including their implications for developing and other countries" (TD/RBP/COM.2/EM/2). See also the WTO *Annual Report 1997*, op. cit.

8/ Now incorporated in GATT 1994.

9/ See OECD, "History and potential benefits of positive comity" (DAFFE/CLP/WP3(98)3).

10/ See H. Spier and T. Grimwalde, "International engagement in competition law enforcement: the future for Australia", *Trade Practices Law Journal* 5 (1997), p. 232.

11/ See WTO Working Group on the Interaction between Trade and Competition Policy, "Submission from the United States" (WT/WGTCP/W/48).

12/ See Commission of the European Communities, "Commission report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws - 1 January 1997 to 31 December 1997", Brussels, 11 May 1998.

13/ Ibid.

14/ Reported in UNCTAD, "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4/6).

15/ See WT/WGTCP/W/48, op. cit.

16/ See also "Consorzio del Prosciutto de San Daniele - Consorzio del Prosciutto di Parmi" (Rif. 1138, Delibera del 19.06.96 - Boll. N. 25/1996) (production quotas maintained by Parma ham producers in Italy, the Federal Trade Commission deferred enforcement action to the Italian competition authority).

17/ See "Klein, Pitofsky, business leaders brief senators on pitfalls of foreign enforcement", *Antitrust & Trade Regulation Report* 75, 8 October 1998, p. 417.

18/ See "FTC Chairman discusses competition policy trends in international antitrust enforcement", *Antitrust & Trade Regulation Report* 75, 12 November 1998, p. 555.

19/ See *Ahlstrom et al. v. European Commission* (1988) ECR 5193, (1988) 4 C.M.L.R. 901, and WT/WGTCP/W/48, op. cit.

20/ See TD/B/COM.2/EM/2, op. cit.

21/ See M. Bloom, "International cooperation between competition authorities", speech to the Law Society's Solicitors' European Group Annual Conference, Bristol, 13 June 1997, p. 5, cited in OECD, op. cit.

22/ See "International cooperation in civil matters by Canadian authorities remains in limbo", *Antitrust and Trade Regulation Report* 75, 8 October 1998, p. 416.

23/ Reported in TD/B/RBP/CONF.4/6, op. cit.

24/ See WT/WGCP/W/48, op. cit.

25/ See German Monopolies Commission, *The Twelfth Biennial Report 1996/1997: Opening up Markets Extensively*, Nomos Verlagsgesellschaft, Baden-Baden, 1998.

26/ Ibid.

27/ See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, London, 18 November 1996.

28/ See UNCTAD, "The basic objectives and main provisions of competition laws and policies" (UNCTAD/ITD/15) and TD/B/COM.2/EM/2, op. cit.

29/ See WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from the United States - The impact of regulatory practices, State monopolies, and exclusive rights on competition and international trade" (WT/WGTCP/W/83).

30/ Ibid.

31/ "Japan - Measures affecting Consumer Photographic Film and Paper" (WT/DS44/R, 31 March 1998).

32/ See OECD, *Competition Policy and International Trade: Instruments of Cooperation*, Paris, 1987.

33/ See A. Schaub, "International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings", *EC Competition Policy Newsletter*, No. 1 (1998), p. 2.

34/ See Schaub, op. cit.

35/ See statements by the representatives of Brazil, Canada and the United States in WTO Working Group on the Interaction between Trade and Competition Policy, "Report on the meeting of 11-13 March 1998" (WT/WGTCP/M/74, paras. 41, 54 and 55).

36/ See Spier and Grinwalde, op. cit.

37/ See the statement by the representative of Brazil in paragraph 55 of WT/WGTCP/M/74, op. cit.

38/ Reported in TD/RBP/CONF.4/6, op. cit.

39/ See Y. Kenfack, "La politique de la concurrence dans les transports maritimes internationaux: enjeux pour les pays en développement", study prepared for the UNCTAD secretariat.

40/ See TD/RBP/CONF.4/6, op. cit.

41/ Ibid.

42/ See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, Chatham House, London, 18 November 1996.

43/ Communication by the Mexican authorities to the Secretary-General of UNCTAD. See also WTO Working Group on the Interaction between Trade and Competition Policy, "Report of the meeting of 27 and 28 November 1997" (WT/WGTCP/M/3, statement of the representative of Mexico in para. 65).

44/ See G. Castañeda, "Mexico: competition policy and economic integration in NAFTA and MERCOSUR", *International Business Lawyer* 26 (1998), p. 496.

45/ See the statement by the representative of Argentina in paragraph 53 of WT/WGTCP/M/4, op. cit.

46/ See B. Ciuffetelli, "Role of antitrust law in Latin American integration", *International Business Lawyer* 26 (1998), p. 522.

47/ See Schaub, op. cit.

48/ For information on the intensive exchanges taking place within the OECD, see WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from OECD" (WT/WGTCP/W/21).

49/ See European Commission, *XXVIIth Report on Competition Policy* 1997, Brussels-Luxembourg, 1998.

50/ WTO Working Group on the Interaction between Trade and Competition Policy, "Report on the meeting of 11-13 March 1998" (WT/WGTCP/M/4), paragraph 52.

51/ See Y. Kenfack, "Règlementation communautaire de la concurrence et renforcement du processus d'intégration économique en Afrique Centrale", study prepared for the UNCTAD secretariat.

ANNEX 1

BILATERAL AGREEMENTS ON COMPETITION LAW ENFORCEMENT

Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to Mutual Cooperation regarding Restrictive Business Practices (Bonn, 23 June 1976).

Agreement between the Government of the United States of America and the Government of Australia relating to Cooperation on Antitrust Matters (Washington, 29 June 1982).

Agreement of the Federal Republic of Germany and the Government of the French Republic concerning Cooperation on Restrictive Business Practices (28 May 1984).

Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Their Competition Laws (23 September 1991; entry into force, 10 April 1995).

Cooperation and Coordination Agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission (July 1994).

Agreement between the Government of the United States of America and the Government of Canada regarding the Application of Their Competition and Deceptive Marketing Practices Laws (Washington, 1 August 1995 and Ottawa, 3 August 1995).

Agreement between the United States of America and Australia on Mutual Antitrust Enforcement (1997).

Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (4 June 1998).

ANNEX 2

SELECTED FREE TRADE, CUSTOMS UNION OR COMMON MARKET AGREEMENTS WITH COMPETITION LAW AND POLICY PROVISIONS

Treaty Establishing the European Coal and Steel Community (Paris, 18 April 1951).

Treaty Establishing the European Economic Community (Rome, 25 March 1957).

Convention establishing the European Free Trade Association (Stockholm, 4 January 1960).

Association Agreement between the European Economic Community and Turkey (1961), with Decision No. 1/95 of the European Union-Turkey Association Council on Implementing the Final Phase of the Customs Union (22 December 1995).

Treaty Establishing the Central African Customs and Economic Union (Brazzaville, December 1964).

Andean Subregional Integration Agreement (Cartagena, 26 May 1969), together with Decision 285 of the Andean Commission, "Norms to prevent or correct competitive distortions caused by practices that restrict free competition" (21 March 1991).

Treaty Establishing the Carribean Community (Chaguaramas, 4 July 1973; entry into force, 1 August 1973).

Australia-New Zealand Closer Economic Relations Agreement (entry into force, 1 January 1983), with the Protocol on the Acceleration of Free Trade in Goods (1988; entry into force, 1 July 1990), and the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Harmonization of Business Law (1 July 1988).

Southern Agreement Common Market (Asunción, 26 March 1991), together with decision 17/96 containing the Protocol on the Defence of Competition (17 December 1996).

Treaty Establishing the Southern African Development Community (Windhoek, 17 August 1992), together with the Protocol on Trade (August 1996).

North American Free Trade Agreement between the Government of the United States of America, the Canadian Government and the Government of the United States of Mexico (Washington, 8 and 17 December 1992; Ottawa, 11 and 17 December 1992; and Mexico City, 14 and 17 December 1992).

Central European Free Trade Agreement (entry into force, 1 March 1993).

Commonwealth of Independent States Treaty on Economic Union (Moscow, 24 September 1993).

Treaty on the Harmonization of Business Law in Africa (Port Louis, 17 October 1993).

Treaty Establishing the Common Market for Eastern and Southern Africa (Kampala, 5 November 1993).

Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden (13 December 1993; entry into force, 1 January 1994).

Treaty Establishing the Central African Economic and Monetary Community (Djamena, 16 March 1994).

Europe agreements between the European Communities and their member States, of the one part, and, respectively: the Republics of Hungary and Poland, of the other part (Brussels, 16 December 1991; entry into force, 1 February 1994); the Republics of Bulgaria and Romania (entry into force, 1 February 1995); the Republics of Estonia, Latvia and Lithuania (12 June 1995); and Slovakia and Slovenia (15 June 1995).

Europe agreements establishing an association between the European Communities and their member States, of the one part, and, respectively, the Czech Republic, the Slovak Republic and Romania (entry into force, 1 February 1995).

Agreements on free trade and trade-related matters between the European Community, the European Coal and Steel Community, and the European Atomic Energy Community, of the one part, and, respectively: the Republics of Estonia, Latvia and Lithuania (12 June 1995); and the Republics of Slovakia and Slovenia (15 June 1995).

Agreements on partnership and cooperation between the European Community, the European Coal and Steel Community and the European Atomic Energy Committee, of the one part, and, respectively: Ukraine (14 June 1994); the Russian Federation (24 June 1994); the Republic of Kazakstan (23 January 1995); the Kyrgyz Republic (9 February 1995); the Republic of Moldova (28 November 1994); and the Republic of Belarus (6 March 1995).

Osaka Action Agenda, 1995, adopted by the Asia-Pacific Economic Cooperation forum (APEC).

Euro-Mediterranean agreements establishing an association between the European Communities and their member States, of the one part, and, respectively: the State of Israel, of the other part (Brussels, 22 November 1995); the Kingdom of Morocco (30 January 1996); the Republic of Tunisia (17 July 1996); the Palestinian Authority (2 June 1997); and Jordan (24 November 1997).

Framework cooperation agreement leading ultimately to the establishment of a political and economic association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part (Florence, 21 June 1996).

Canada/Chile Free Trade Agreement (Ottawa, 14 November 1996; entry into force, 1 June 1997).

ANNEX 3

MULTILATERAL AND PLURILATERAL INSTRUMENTS DEALING WITH COMPETITION LAW AND POLICY

OECD Declaration on International Investment and Multinational Enterprises (Annex, Doc. 21 (76) 04/1, 21 June 1976).

Recommendation of the OECD Council on restrictive business practices affecting international trade, including those involving multinational corporations (20 July 1978).

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by General Assembly resolution 35/63 of 5 December 1980.

Recommendation of the OECD Council for cooperation between member countries in areas of potential conflict between competition and trade polices (C(86)65(Final), 23 October 1986).

Recommendation of the OECD Council, "minimizing conflicting requirements: approaches of moderation and restraint" (1987).

Final Act of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, April 1994).

Revised recommendation of the OECD Council concerning cooperation between member countries on anti-competitive practices affecting international trade (27 and 28 July 1995 (C(95)130/FINAL)).

Recommendation of the OECD Council concerning effective action against hard-core cartels.

WTO Agreement on Basic Telecommunications Services, (15 February 1997; entry into force, 1 January 1998).

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WORK PROGRAMME, INCLUDING TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON COMPETITION LAW AND POLICY AND PREPARATIONS FOR THE FOURTH UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF PRINCIPLES AND RULES

Review of technical assistance, advisory and training programmes on competition law and policy

Note by the UNCTAD secretariat

Executive summary

UNCTAD provides various types of technical assistance and advisory and training programmes on competition law and policy to developing countries and countries in transition in accordance with requests received, the needs of the countries concerned and the resources available. In this note, the technical cooperation activities of the UNCTAD secretariat are described under three main subheadings: national activities; regional and subregional activities; and participation in seminars and conferences. The note also contains extracts from replies from States members of UNCTAD and international organizations to the request by the Secretary-General of UNCTAD for information on technical cooperation activities provided, planned or received in the field of competition law and policy. The main points from replies requesting technical assistance in specific areas of competition law and policy or highlighting issues which should receive priority attention are also included.

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I. INTRODUCTION

1. It is recalled that the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices requested the UNCTAD secretariat, taking into account the increased needs for technical cooperation and assistance in developing countries, countries in transition and other countries, to carry out a review of the technical cooperation activities undertaken by UNCTAD and other international organizations, as well as by individual States, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy (TD/RBP/CONF.4/15, Annex I). The Third Review Conference also urged intergovernmental organizations and financing programmes and agencies to provide resources for technical cooperation activities in this area, and it appealed to Governments, in particular those of developed countries, to increase voluntary financial contributions and to provide the necessary expertise for the implementation of such activities.

2. Subsequently, in the agreed conclusions of its first session, the Intergovernmental Group of Experts on Competition Law and Policy took note with appreciation of the voluntary financial and other contributions received from member States and invited all member States to assist UNCTAD on a voluntary basis in its technical cooperation activities by providing experts, training facilities or financial resources. It also requested the UNCTAD secretariat to pursue its technical cooperation activities within available resources, taking into account the deliberations and consultations that had taken place at the session, and invited the Secretary-General of UNCTAD to explore the feasibility of supporting training and capacity-building on a regional basis within available resources. It further requested the UNCTAD secretariat to prepare for consideration by the forthcoming meeting of the Intergovernmental Group of Experts an updated review of technical assistance, taking into account the information to be submitted by member States and international organizations no later than 31 January 1999 (TD/B/COM.2/CLP/5, Annex I).

3. Accordingly, this note contains a progress report on the technical cooperation activities of the UNCTAD secretariat in the period shortly before and after the first session of the Intergovernmental Group of Experts, held in July 1998, as well as extracts from replies from member States to the request by the Secretary-General of UNCTAD for information on technical cooperation activities in the field of competition law and policy (TDN 915 (1) of 22 October 1998).

II. PROGRESS REPORT ON UNCTAD TECHNICAL COOPERATION

4. UNCTAD provides assistance and advisory and training programmes on competition law and policy to developing countries and countries in transition in accordance with requests received, the needs of the countries concerned and the resources available. The main types of technical cooperation activities carried out by the secretariat are as follows:

(a) Provision of information on restrictive business practices, their existence and possible adverse effects on the economy - this may involve a study of restrictive business practices in a specific country;

(b) Introductory seminars directed at a wide audience, including government officials and academics, as well as business and consumer-oriented circles;

(c) Assistance to States which are in the process of drafting competition legislation, in the form of provision of information on such legislation in other countries or advice on drafting competition legislation;

(d) Advisory services for the setting-up of a competition authority - these usually include training the officials responsible for the actual control of restrictive business practices and may involve training workshops or on-the-job training with competition authorities in countries with experience in the field of competition;

(e) Organization of seminars for States which have already adopted competition legislation, have experience in the control of restrictive business practices and wish to consult each other on specific cases and exchange information;

(f) Assistance to States which wish to revise their competition legislation and seek expert advice from competition authorities in other States, to enable them to amend their laws as effectively as possible.

5. The main technical cooperation activities carried out by the UNCTAD secretariat for the above-mentioned period are described below.

A. National activities

6. UNCTAD participated in the process of developing the competition law and policy of **Malawi**. The Competition Bill was drafted in close cooperation with UNCTAD, which recruited an expert to coordinate and finalize the work of the drafting team. An advisory mission was organized by UNCTAD to provide assistance in the preparation of the rules of application of the competition law and in drafting the job descriptions of the commissioners recruited for the Competition and Fair Trade Commission. UNCTAD also assisted in arranging for the participation of two Malawian officials in a three-week training course organized by the Monopolies and Prices Commission of Kenya in cooperation with UNCTAD.

7. The UNCTAD secretariat has continued to collaborate with the Government of **Mauritius** on the finalization of a competition law for Mauritius, which was prepared by experts earlier engaged by UNCTAD. Once the law is adopted, UNCTAD will be involved in the implementation of follow-up activities to be agreed upon in cooperation with the Mauritian authorities.

8. As a result of an advisory mission undertaken by the secretariat to **Zambia**, a training programme for national officials was developed, the first phase of which consisted of the attachment of three Zambian commissioners to the Norwegian competition authority in September 1998. The preparatory work on a common approach to competition policy for the member States of the Common Market for Eastern and Southern Africa (COMESA) was completed, and a subregional conference to formulate such an approach is scheduled to be held in Lusaka in April 1999.

9. In September 1998 an advisory mission to **Morocco** was undertaken by the secretariat to support the efforts of the Ministry of General Affairs, which is responsible for the preparation of the Moroccan competition law, to discuss in detail the provisions of this law.

10. The secretariat has continued to collaborate with the Government of **Egypt** in the preparation of a competition law for that country. Together with the competition authorities of Italy and the European Commission (DG-IV), the secretariat has provided comments on revised draft competition legislation and organized a second advisory mission in cooperation with the Italian competition authority. The provision of further assistance to the Egyptian authorities is envisaged once the law is adopted.

11. Also in cooperation with the competition authorities of Italy and the European Commission (DG-IV), the secretariat provided comments on a draft revision of the competition law of **Kenya**. A study tour for officials from the Monopolies and Price Commission of Kenya was arranged by the secretariat, to allow them to visit the competition authorities of the United States of America.

12. A seminar on competition and consumer protection law was organized by the secretariat in November 1998 in **Viet Nam**. The seminar included training courses and visits to enterprises. Also, specific issues related to business practices in Viet Nam were discussed with managers and other economic operators. The secretariat also provided comments to the review panel working on the draft consumer protection law of Viet Nam.

13. A seminar on competition law and policy, organized by the State anti-monopoly service of **Georgia** in cooperation with the UNCTAD secretariat, was held in May 1998 in Tbilisi. The objective of the seminar was to enhance the expertise of participating national experts on competition, and to discuss their concerns and technical questions related to various aspects of competition and consumer protection legislation.

14. A national seminar in the **Islamic Republic of Iran** was organized in May 1998 by the secretariat in cooperation with the Ministry of Commerce in that country. The seminar brought together a wide range of participants, including representatives of ministries, the State and the private business sector as well as representatives from academic and consumer circles, and alerted them to the importance of the competition issue and specific features of competition legislation.

15. In addition, comments on draft competition legislation were also submitted by the secretariat at the request of the Governments of **Guatemala** and **Malaysia**. Additional requests for national seminars have been received from Benin, Botswana, Burkina Faso, Indonesia, Namibia and Togo.

B. Regional and subregional activities

16. The UNCTAD secretariat organized, in cooperation with the secretariat of the Central African Customs and Economic Union (UDEAC), a two-week workshop on competition law and policy for UDEAC countries, which took place in Libreville, Gabon from 6 to 17 July 1998. Participants from Cameroon, the

Central African Republic, Chad, the Congo, Equatorial Guinea and Gabon attended the workshop. One of the main objectives of the seminar was to train experts from UDEAC, who would then assume training responsibilities in their home countries. An important feature of the seminar was the focus on case studies presented by resource persons and participants, which formed the basis for discussion and an exchange of information on different approaches to anti-competitive practices. This seminar was the third in a series of regional and subregional seminars planned for Africa (the two previous seminars had been held in Nairobi in January 1998 and in Cairo in March 1998).

17. A regional Arab seminar on competition law and policy, held in Manama, Bahrain, from 20 to 21 October 1998, was organized by UNCTAD jointly with the Government of Bahrain and was attended by representatives of Bahrain, Egypt, Jordan, Lebanon, Mauritania and Saudi Arabia. Lectures were given by experts from Germany, Malta, Morocco and Tunisia. The objective of the seminar was to assist Arab countries in participating fully in the multilateral forums at which competition issues are discussed and domestic competition policies are formulated. Participants discussed various issues of competition law and policy of relevance to the countries in the region, specifically addressing the problems of small and oil-dependent economies.

18. In cooperation with the authorities of Côte d'Ivoire, UNCTAD held a regional seminar on competition law and policy and consumer protection for West African countries from 16 to 18 December 1998 in Abidjan. The seminar was attended by participants from various ministries, business associations and consumer groups from Benin, Burkina Faso, Chad, Mali, Mauritania, Senegal and Togo, as well as the host country. The seminar included training courses and visits to enterprises. Also, specific issues related to business practices in Côte d'Ivoire and other participating countries were discussed with managers and other economic operators. Follow-up national seminars are planned for 1999 in five countries of the region.

19. Within the framework of project activities in Africa, a subregional seminar is planned for the first half of 1999 in Morocco, on the role of competition and consumer protection legislation for developing countries in the period of globalization.

20. In cooperation with the German Foundation for International Economic Development, in February 1999 UNCTAD organized a subregional workshop in Pakistan on the harmonization of national competition policies as an integral part of economic cooperation, for the countries of the South Asian Association for Regional Cooperation (SAARC). Participants from Bangladesh, India, Nepal, Pakistan, Sri Lanka and the SAARC secretariat attended this seminar.

21. UNCTAD is also involved in the preparation of an international forum on cooperation in competition policy to be held in Ukraine in May 1999.

C. Participation in seminars and conferences

22. During the period under review, members of the UNCTAD secretariat took part in a number of seminars, workshops and conferences on issues related to competition law and policy and consumer protection. In particular, resource persons from UNCTAD made substantive presentations or participated in discussions at the following meetings:

(a) The Second Oslo Competition Conference (21-22 September 1998), which brought together a wide range of government officials, business representatives and academics to discuss the foundations of competition policy analysis;

(b) The First International Competition Symposium, held from 5 to 6 October 1998 in Istanbul by the Turkish Competition Authority;

(c) The OECD Committee on Competition Law and Policy, Working Party No. 2 on Competition and Regulation and Working Party No. 3 on International Cooperation (Paris, 26-31 October 1998);

(d) The International Development Law Institute (IDLI) seminar on trade liberalization and restrictive business practices (Rome, 16-27 November 1998), which was attended by senior officials from developing countries in Asia, Africa and Latin America;

(e) The Asia-Pacific Economic Cooperation Forum (APEC)/PFP Course on Competition Policy for APEC Member Economies (Chiangmai, Thailand, 1-4 March 1999), jointly organized by the Department of Internal Trade of Thailand and the Fair Trade Commission on the International Cooperation Agency of Japan.

III. TECHNICAL COOPERATION OF MEMBER STATES AND INTERNATIONAL ORGANIZATIONS

A. Technical assistance provided, planned or received

23. Below are the main points from the replies to the Secretary-General's note TDN 915 (1) of 22 October 1998, which requested information on technical cooperation activities in the field of competition law and policy.

Azerbaijan

24. The Ministry of Foreign Affairs of Azerbaijan informed the Secretary-General that an agreement on the conduct of an agreed anti-monopoly policy among the member States of the Commonwealth of Independent States had been signed, and its validity was envisaged to be extended till 2001.

Bulgaria

25. The Bulgarian Commission for the Protection of Competition (CPC) has received technical assistance in the field of competition law and policy from the European Commission through the PHARE programme (1993-1995). The following activities have been undertaken under this programme: analysis of

Bulgarian competition law, with a proposal for its improvement; information system; initial list of assistance received from certain States; assistance in resolving specific cases; training courses for specialists; library on problems relating to competition policy and practice. With technical assistance from OECD, the CPC experts participate in international seminars on competition law and practice. Technical assistance has been provided by the United States Agency for International Development (USAID), the Japanese Agency for International Cooperation (JAIKA), the Governments of France and Germany, and the German Agency for International Legal Assistance. This assistance has taken the following forms: seminars (in Bulgaria or abroad), training courses, documentation. In 1998, the CPC formulated a new technical assistance project under the PHARE programme, but unfortunately financing has not been forthcoming.

Burkina Faso

26. The liberalization of the economy of Burkina Faso with an appropriate legal framework has prompted the national authorities to set up a body to regulate competition - the National Commission on Competition and Consumer Protection. Consequently, increased technical assistance in strengthening competition law and policy in Burkina Faso has become extremely important. Unfortunately, the country does not receive technical assistance in the field of competition law and policy as such. Relevant activities amount to occasional participation in international seminars.

Colombia

27. In November 1996, in the context of South-South cooperation, the Colombian Office of the Superintendent of Industry and Trade offered the following opportunities: (a) the participation of officials in seminars on restrictive business practices and the promotion of competition; (b) technical assistance in the establishment of an area devoted to the promotion of competition and to restrictive business practices; (c) training to enable officials of other agencies to participate in preliminary inquiries, investigations, sectoral studies and visits by the Superintendent's Office; (d) exchange of information relating to legislation, business integration operations, sectoral studies and database on the economic activity of firms. Although the above activities were made available, no offer was taken up. At present, the Superintendent's Office is reported to be in a position to repeat the previous offers. Under the "Col-97-006 programme, Development of the Financial Sector and Credit Capital Market BIRF 4196" there is a chapter devoted to the development of competition and anti-monopoly policy capacity aimed at developing the following areas: institutional policy know-how and substantive areas, institutional know-how on procedural matters, policies, guidelines and regulations, and infrastructure.

Finland

28. In 1997-1998, the Finnish Competition Authority (FCA) primarily carried out technical cooperation activities in the antitrust field with Estonia and the near regions of the Russian Federation. The bilateral technical cooperation with Estonia is based on an umbrella agreement on economic cooperation and support concluded by the Finnish and Estonian Governments.

In 1996, an annual programme for Finnish-Estonian cooperation on economic and technical assistance was established. Technical cooperation with the Russian Federation is based on a temporary agreement between the FCA and the State Anti-Monopoly Committee of the Russian Federation. The FCA also participated in the technical assistance coordinated by the European Commission and the Organization for Economic Cooperation and Development (OECD).

29. Technical cooperation included seminars and visits organized for officials from competition authorities and for judges. The FCA has also provided assistance on legislative, administrative and information system issues. In 1998, two seminars were held in Estonia and the FCA received four Estonian officials to familiarize them with Finnish competition law and policy and the working methods of the FCA. Within the framework of cooperation with the Russian Federation, two one-week study trips were organized, one for two Finnish officials to the Russian State Anti-Monopoly Committee and the regional office in St. Petersburg, and the other for two Russian officials to Finland. An official from the FCA also participated in a four-day seminar organized by the OECD in St. Petersburg for Russian judges and officials.

France

30. Technical assistance activities undertaken by the French Directorate-General for Competition, Consumer Protection and Fraud Control (DGCCRF) in 1998 have involved the central and eastern European countries (CFECs - Bulgaria, Czech Republic, Estonia, Romania, Slovenia), Brazil, China, Côte d'Ivoire, Russia, Taiwan and Tunisia. There is a tendency towards redeployment to the CEECs and Latin America, cooperation with Argentina being planned for 1999. Most of these activities have been financed in a bilateral context by the Ministry of Economic Affairs, Finance and Industry (ADETEF), with the exception of Côte d'Ivoire and Estonia (financing by the Ministry of Foreign Affairs), Russia (covered by the TACIS programme) and Romania (covered by the PHARE programme). The DGCCRF missions comprise various types of activities: training seminars, appraisal of legal texts, evaluation of administrative supervisory structures. The DGCCRF is endeavouring to incorporate its activities, which represent responses to requests by foreign Governments, within an overall, graduated programme covering several years.

Germany

31. The technical cooperation activities of the Federal Cartel Office (FCO) of Germany consist mainly of providing information during in-house talks and at seminars held in the countries concerned and in third countries. The latter activities are mostly financed by outside funds from, *inter alia*, private associations and foundations. In 1997-1998, the ECO received delegations from 21 countries seeking information on German competition law, the structure and function of the FCO and privatization issues. During the same period, experts from the FCO went on technical assistance missions and participated in international conferences and seminars in Austria (a seminar for east European countries), Bahrain, Brazil, Bulgaria, Ecuador, Germany (a seminar for the staff of the Turkish Competition Authority), Indonesia, Kenya, Malaysia, Romania, the Russian Federation, Sri Lanka and Ukraine. As one member of the Federal Trade Commission of Korea completed a training period at the FCO, a new member began his traineeship.

Italy

32. During 1998 the Italian Competition Authority participated in training and technical assistance seminars in the field of competition organized by OECD in Helsinki and Istanbul and by UNCTAD in Cairo. The Italian Authority also participated in a training course on competition policy organized by the World Bank. At the bilateral level, the Italian Authority commented on competition law projects formulated by Egypt and Kenya, and it hosted a two-day visit by officials from the Polish Competition Authority. The technical assistance programme focused primarily on the following subjects: examination of Italian law; relations between the Italian Competition Authority and the Commission; methods of legal and economic analysis used by the Authority in cases of abuse, conspiracy and concentrations; relations between liberalization, privatization and competition.

Japan

32a. In cooperation with the Japan International Cooperation Agency (JICA), the JFTC has started to hold a group training course on Anti-Monopoly Act & Competition Policy for mid-level staff of competition authorities of developing countries since 1994. This course consisted not only of explanation of Japan's competition law and policy, but also of studies on competition laws of other developed countries, case studies to illustrate the role of competition policy, and reports and discussions about participants' experiences in their home countries as well. The JFTC has also started to hold focused country training programmes on Anti-Monopoly Act & Competition Policy for mid-level staff of competition authorities in China, Thailand and the Russian Federation.

Norway

33. In 1998, the Norwegian Competition Authority (NCA) organized a two-week programme for three competition experts from the Zambia Competition Commission. The NCA's legal director assisted the South African authorities in drafting a new competition act and in establishing new competition authorities. The NCA also organized an international conference, entitled "Foundations of competition policy analysis", which was attended by 145 participants from 20 countries.

Portugal

34. During the last three years, the Directorate General for Trade and Competition (DGCC) of Portugal has undertaken most of its technical cooperation activities with the central and eastern European countries through the PHARE programme, as follows:

(a) Training courses and seminars for officials from Bulgaria, Estonia, Hungary, Slovakia and Slovenia;

(b) A working session in Lisbon with a high-level team from the Polish Competition Authority, which also involved the Portuguese Competition Council: the agenda of the session was focused on the organization and functioning of the Competition Authority, harmonization of competition legislation, mergers control, State monopolies, regulatory activity in the field of telecommunications and energy, distribution and the retail sector;

(c) A working session in Lisbon with representatives of the Russian Price Inspection Board and officials from the Ministry of the Economy of the Russian Federation to discuss the Portuguese price policy, infringement and fraud control;

(d) A working session in Lisbon with the Turkish Competition Authority to exchange experiences on the enforcement of competition law;

(e) A working session in Lisbon with representatives of the Taipei Fair Trade Commission with the aim of strengthening bilateral cooperation and promoting a better understanding between the two competition bodies.

35. Bilateral cooperation has also been developed with African Portuguese-speaking countries, in the form of a training course on competition policy held in Guinea-Bissau and a seminar on price liberalization and competition held in Angola. The DGCC has expressed its interest in participating in the European Commission's activities to strengthen institutional and administrative capacity ("institutional twinning") to support the preparation of the central and eastern European candidates for membership of the European Union. A working session with the Romanian Competition Authority is planned for February 1999 in Lisbon. The DGCC is also looking into the possibility of developing bilateral cooperation activities with competition authorities in Algeria, Brazil, the Russian Federation, Turkey and African Portuguese-speaking countries (within the scope of the cooperation protocols signed between the DGCC, Angola and Guinea).

Slovakia

36. The Anti-Monopoly Office of Slovakia takes advantage of the possibilities offered by the PHARE programme, complemented by resources from the Know-How Fund, the United States Agency for International Development (USAID) and the German Foundation for International Cooperation. The Office participates in international cooperation provided through the European Union, the Central European Free Trade Agreement (CEFTA), the OECD, the Commonwealth of Independent States and UNCTAD and through international agreements on free trade by which Slovakia is bound. The Office maintains contacts with the countries of Europe and with the United States, its closest cooperation being with countries of central and eastern Europe and the European Union. Priorities are set by the Office in respect of long-term goals (for example, it has given priority to a decree with detailed provisions on exemptions from the prohibition of agreements restricting competition, and to the government policy to strengthen the independence of the Anti-Monopoly Office) as well as more pressing issues, such as the *de minimis* doctrine, block exemptions, amending the law on the protection of economic competition in the field of concentrations, strengthening the Office's position concerning interventions of State administrative authorities and municipalities, the institutional framework of the Office and ways of strengthening its independence and position, the harmonization of Slovak competition law with the European Union's competition law, and developing closer relations with the OECD, UNCTAD and the World Trade Organization (WTO).

Spain

37. During 1998 officials from Argentina, Colombia, Costa Rica, Mexico, Paraguay and Venezuela have attended courses (of one or two weeks' duration) in Spain organized in a bilateral context and financed by the Spanish Agency for International Cooperation (AECI), with the cooperation of the Latin American Economic System (SELA).

Sweden

38. In 1998 the Swedish Competition Authority was involved in providing technical assistance to several countries, in particular to countries applying for membership of the European Union, with priority being given to the Baltic States. Officials from the Baltic States visited the Authority to learn about the Swedish experiences of competition law enforcement. A delegation from the Polish Competition Authority as well as delegations from Botswana, Romania, Ukraine and Zambia also visited the Authority. Experts from the Swedish Competition Authority also delivered lectures and participated in discussions at conferences and seminars in different countries, notably at a seminar held in Sofia in December 1998, arranged by the OECD for representatives of competition authorities from Bulgaria, Croatia and Romania. Officials from the Authority also discussed competition issues at seminars in Estonia, Lithuania and Ukraine. The Authority also arranged a two-day seminar for a number of Estonian judges to study the application of the competition rules by the Authority and by the Market Court.

39. With reference to the previous Swedish reply on the request for information on technical assistance, the present reply stated that in some countries, particularly those in transition to a market economy, both the competition authorities and the administration as a whole appear to need assistance in implementing competition policy, while in countries with more experience of competition policy, there seems to be a demand for practical training by the competition authorities in competition law enforcement. Specific competition problems related to deregulation in infrastructure sectors are another area of priority. There is also a need for assistance in the area of market access and for clarification of the relationship between competition policy and trade policy, probably as a result of the work in WTO. Greater efficiency in the provision of assistance would release more resources for technical cooperation; such efficiency could be achieved by planning more carefully and by encouraging the exchange of information between the various parties responsible for technical assistance projects, such as national authorities and international organizations. The initiative of the UNCTAD secretariat in this regard is very welcome.

United States of America

40. In 1998, the United States federal antitrust agencies (the Department of Justice and the Federal Trade Commission) (a) provided long-term advisers to Argentina and Romania, (b) sent one or more short-term technical cooperation missions to Argentina, Brazil, Romania, Slovakia, Slovenia and Ukraine, (c) hosted as interns competition officials from Argentina, Jamaica, Kenya, Peru and Switzerland, (d) participated in OECD competition conferences in Kiev and Vienna, and (e) provided two sets of comments to UNCTAD on the proposed

Egyptian competition law. Most of the expenses for these technical cooperation activities were met by USAID; some of the expenses for the two Kenyan interns were met by UNCTAD.

Economic Commission for Africa

41. As the technical assistance provided by the Economic Commission for Africa (ECA) to member States in the area of competition law and policy is very specialized, this assistance has been modest and has centred on trying to help African countries share experiences in developing competition law and policy. In 1997, ECA undertook a preliminary study on competition law and policy in the context of African countries, with a view to reviewing progress made by African countries in implementing competition law and policy. The study served as a background paper for an ad hoc expert group meeting organized by ECA in early 1998 in collaboration with UNCTAD and WTO, on follow-up activities to the First WTO Ministerial Conference.

European Commission

Central and eastern European countries

42. The European Agreements stipulate that the Community shall provide the central and eastern European countries (CEECs) with technical assistance in the harmonization of legislation. During 1998 the Commission provided technical assistance on competition through study tours, seminars and working groups. An official from the Slovenian Ministry of Finance visited the United Kingdom, while three officials from the Polish Ministry of Economic Affairs visited the Netherlands. The Commission organized a two-day seminar on Community anti-trust policy and another on State assistance policy, in cooperation with the Centre for European Studies in Strasbourg. In addition, it organized two one-week seminars, entitled "joint training sessions", in Brussels, which analysed anti-trust policy and State assistance policy. The first joint training session was intended for officials with no experience in the area of competition, while the second was attended by senior officials. A number of external working groups (of two days' duration) on State assistance were held in Estonia, Lithuania and Slovenia. Community legislation and policy were explained to officials from authorities granting State assistance.

Latin America

43. Directorate-General IV (DG-IV) acts in conjunction with DGIB, which is responsible for external relations and manages budgetary resources. Ever since the establishment of a full range of agreements with the Latin American countries, the Commission's strategy has been to strengthen relations with various groups of countries (MERCOSUR, Andean Community and, possibly, Central American Isthmus countries where the process of integration and linkage with CARICOM is reviving). Identification missions were already undertaken in 1997 to MERCOSUR and the Andean Community. Pending the establishment of a schedule, various ad hoc cooperation activities have been initiated: (a) compilation of competition legislation of the Latin American and Caribbean countries; (b) establishment of a file of competition authorities and institutions in order to facilitate relations between officials responsible for implementing competition policy and the business

world; (c) establishment of a *Boletín Latinoamericano de competencia*, a periodical to which all countries contribute; coordination is ensured by the Commission, the bulletin is published by the various countries in turn and distribution is via the Internet; (d) the Commission receives over 200 e-mail requests for consultation annually from competition authorities and other institutions; they are all carefully considered with the aim of giving specific answers to requests.

44. The Commission has initiated negotiations with Mexico on the establishment of a free-trade regime. Under the interim agreements of 1997, it is stipulated that the European Union and Mexico will have a cooperation mechanism that will extend to technical cooperation. Specific results of these negotiations are expected by the end of 1999. Similarly, negotiations with MERCOSUR and Chile are scheduled for next autumn.

The Mediterranean region

45. Coordination is also ensured with DGIB. Agreements have already been concluded with Israel, Jordan, Morocco, the PLO and Tunisia or are in the course of negotiation (with Algeria, Egypt, Lebanon, and Syria). The provisions relating to competition contain clear commitments aimed at harmonizing the competition policies of the countries concerned with the Community regime. Only Algeria and Tunisia have made requests for technical assistance. The first report identifying a programme of technical assistance for Tunisia has been prepared by a consultant and is being studied by the Tunisian authorities. On the recommendation of DG-XV and DGIB, a communication from the Commission concerning "Mediterranean partnership and the single market" has been prepared. It proposes, *inter alia*, horizontal activity in the area of competition, which will enable progress to be made in cooperation and technical assistance.

African, Caribbean and Pacific States

46. The promotion of the competition policy of the ACP States and cooperation between these States, and between these States and the European Union, is one of the objectives of negotiations on a partnership agreement for development which were initiated by the Union and the ACP States in September 1998. The capacity of the ACP States to deal with this question constitutes a prerequisite for successful integration within the world economy. The negotiations must give rise to an EU/ACP partnership agreement before 1 March 2000, when the current Lomé Convention expires. In this connection, the Commission intends to establish a "programme of assistance in integration within the world trade system" with substantial resources, which will finance technical assistance activities in various trade-related fields, including competition policy.

World Trade Organization

47. The Singapore Ministerial Declaration (para. 22) provides that the technical cooperation programme of the WTO secretariat shall be available to developing and, in particular, least developed country members, to facilitate their participation in the Organization's work programme on the interaction between trade and competition policy. To this end, the WTO secretariat has

organized, in cooperation with other intergovernmental organizations, special events to facilitate the participation of developing countries in the work programme of the Working Group on the Interaction between Trade and Competition Policy. In addition, a staff member of the WTO secretariat has participated in events sponsored by other intergovernmental organizations or by Governments to promote understanding of issues in this area. WTO secretariat officials have also maintained regular contacts with representatives of developing countries based in Geneva and visiting experts from capitals as well as with officials in their capitals, in order to facilitate their preparation for and participation in the meetings of the Working Group. More specifically, the WTO secretariat has contributed to the following technical cooperation events and activities relating to competition law and policy:

(a) On 29 November 1997, WTO, in cooperation with UNCTAD and the World Bank, hosted a symposium on competition policy, economic development and international trade, which was open to participants in the work programmes related to competition policy of all three organizations;

(b) On 25 July 1998, WTO, again in cooperation with UNCTAD and the World Bank, hosted a second symposium, open to the same participants, on "competition policy and the multilateral trading system: issues for consideration in the international community";

(c) In 1998, a member of the WTO secretariat took part in the UNCTAD regional seminars on competition policy for African countries held in Cairo and Libreville and made presentations on the work of the Working Group and related matters;

(d) A member of the secretariat also participated in a meeting of the APEC Working Group on Competition Policy and Deregulation in Kuantan, Malaysia, in September 1998 and in a conference sponsored by the Turkish Competition Authority in October 1998, which included representatives of newly-established competition authorities in several economies in transition;

(e) The secretariat provided extensive, informal advice to delegations in Geneva on how to prepare their written and other inputs to the Working Group;

(f) A module on the interaction between trade and competition policy has been presented on several occasions, as an element of the general course run by WTO on trade policy for the staff of developing country member Governments.

48. The secretariat plans to hold a third symposium in the coming year, again in cooperation with other intergovernmental organizations if possible, on aspects of the programme of further work set out in the 1998 report of the Working Group. The possibility of organizing one or more regional seminars relating to the Working Group's programme will also be explored. In addition, the secretariat will continue to provide informal assistance to delegations regarding their contributions to the Group, and to participate in seminars and other events organized by intergovernmental organizations and Governments which are relevant to the work programme of WTO in this area.

49. The WTO secretariat appreciates the continuing cooperation of UNCTAD in various aspects of its technical cooperation activities in the area of competition law and policy and believes that there are important benefits to be achieved from cooperation between the two organizations.

B. Requests for technical assistance

50. Below are some details from requests for technical assistance which identify specific areas of competition law and policy which States and international organizations would wish to see receive priority attention.

Azerbaijan

51. The Ministry of Foreign Affairs indicated that priority should be given to measures related to the protection of competition, especially the prevention of cases of discrimination, the creation of market barriers and unfair competition with the purpose of obtaining an advantage, as well as to the elimination of infringements in the area of competition law and policy, the regulation of the functioning of natural monopolies, and the creation of a control mechanism for their activities. The protection of competition and improvement of legislation on natural monopolies, including the preparation and adoption of legislative acts related to competition, has to be a major priority. Training courses should be organized for personnel in specific countries as a step towards the practical implementation of legislation to protect competition.

Botswana

52. Assistance from UNCTAD is needed in finalizing a draft competition policy, which is being discussed and examined by various interested parties. Assistance is also requested in laying the groundwork for a competition law that meets the country's requirements and in providing the necessary training in its enforcement, more particularly in developing the necessary skills to conduct investigations into restrictive business practices and the abuse of dominant position.

Burkina Faso

53. Technical assistance should be provided for the training of senior officials. Such training is essential and should accordingly be extended to senior officials of the National Commission on Competition and Consumer Protection. This is particularly important since this Commission has only recently become operational (August 1998). Short or long-term training in specialized schools such as the Competition and Fraud Control School (France) would therefore be beneficial. It could also take the form of bilateral or multilateral assistance so that concerned States could share their experiences. In this connection, the National Commission has included in its programme of activities study and information missions to certain African and European countries in order to learn about their experiences.

Colombia

54. The Spanish Agency for International Cooperation was asked to provide financing for a study on the various enactments governing the authorities responsible for examining, investigating and punishing alleged violations of competition law in Colombia. DG-IV, the European Community agency responsible for competition matters, has been asked to provide cooperation in this area. We append a communication from the Colombian Embassy in Belgium confirming the Agency's interest in establishing a cooperation programme. We also append a communication containing the specific requests for cooperation. In September 1998 the cooperation of the Inter-American Development Bank was sought for the purpose of strengthening the Office of the Superintendent of Industry and Trade with a view to the enforcement of legislation on free competition. The request covered three areas: the broadening and improvement of investigatory capacity; the development of means of support for investigations and studies on competition; and the development of functions relating to unfair competition.

55. The capacity to carry out competition investigations needs to be strengthened. At present the staff working on competition matters are too few to be able to carry out a sufficient number of investigations that will have the necessary impact on the institutionalization of competition regulations. In addition, in the course of the investigations carried out procedural errors are committed which hinder the effective conduct of the investigations. In this connection, greater resources are needed in order to be able to have more and better-trained experts, which would enable the number of successful investigations to be substantially increased.

Lebanon

56. The Ministry of Economy and Trade has indicated that technical assistance is needed in the following areas:

(a) Offences in relation to competition, such as bid-rigging, conspiracy, illegal trade practices, misleading advertising, double ticketing, multilevel marketing plan, pyramid selling, referral selling, bargain price, bait and switch selling, promotional contests, price maintenance, suggested retail price and refusal to supply;

(b) Restrictive trade practices such as refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction, abuse of dominant position, delivered pricing, refusal to supply by foreign suppliers, order directing registration and conditional orders;

(c) Specialization agreements such as mergers, factors regarding prevention and lessening of competition, and joint ventures.

Malta

57. Assistance is required in the following areas:

(a) To provide the Ministry of Finance and Commerce with expertise on how to amend the Competition Act to render it more effective, especially in view of the Government's intention to make the necessary amendments for

setting up an autonomous authority to deal with both competition affairs and consumer protection: such assistance is quite urgent in view of the fact that proposals to create the Authority have already reached an advanced stage;

(b) To equip the Office for Fair Competition with the techniques necessary to handle complaints and to carry out investigations, since awareness of the Competition Act has effectively increased over the past months;

(c) To advise the Government about those undertakings in which directly or indirectly it has a controlling interest and which are currently acting in breach of the Competition Act, but which are exempted from the relevant provisions.

Nepal

58. Any initiative to realize technical cooperation in the field of competition law and policy would be welcome.

Zimbabwe

59. The Industry and Trade Competition Commission is still in its formative stages and hence needs as much help as possible in dealing with the main issues related to the adoption and efficient application of competition law and policy.

Economic Commission for Africa

60. The Commission wishes to undertake further work, based on country case studies, on the implementation of competition law and policy in Africa and the problems African countries face as they implement trade and investment reforms and adjust their legal systems. In the view of the ECA, this is an area in which UNCTAD and ECA could further enhance collaboration. The ECA wishes to cooperate with UNCTAD in mobilizing extrabudgetary resources to support efforts to implement competition law and policy in Africa.

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WORK PROGRAMME, INCLUDING TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON COMPETITION LAW AND POLICY AND PREPARATIONS FOR THE FOURTH UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF PRINCIPLES AND RULES

Preliminary assessment of the operation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices since the Third Review Conference

EXECUTIVE SUMMARY

This note, prepared by the Secretary-General of UNCTAD, reviews major developments which have taken place at the national, regional and multilateral levels in the field of competition law and policy since November 1995, when the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of RBPs was held. At the multilateral level, mention is made of UNCTAD's cooperation with the World Bank and WTO, as well as the process leading to UNCTAD X in February 2000. The note then reviews in part II the operation of the Set since the Third Review Conference, looking at its main provisions, drawing attention to their actuality and evaluating the extent to which they have been implemented to date. In part III, an evaluation is made of progress in implementation by States members of UNCTAD and by the Intergovernmental Group of Experts on Competition Law and Policy of the resolution adopted by the Third Review Conference, drawing specific attention to technical cooperation, informal consultations and specific studies undertaken by the Group. Finally, in part IV, the note looks at possible progress in the field of competition law and policy in the period leading up to the Fourth Review Conference, a period which includes important landmarks such as the WTO Ministerial Conference in Seattle in December 1999 and UNCTAD X in February 2000.

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I. INTRODUCTION

1. Almost 20 years have passed since the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of RBPs was adopted by the United Nations General Assembly in resolution 36/63 of 5 December 1980, and yet, on the multilateral front, the Set is still the only fully multilateral framework on competition in existence today. The issue of competition law and policy, however, has undoubtedly been given a higher profile at the national, regional and multilateral levels. At the national level, although few new laws have actually been adopted, most countries are now aware of the importance of competition policy, and many developing countries, including LDCs, are in the process of drafting competition legislation. At the regional level, numerous groupings of States, such as the Free Trade Area of the Americas (FTAA), the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA), the Caribbean Community (CARICOM) and Mercosur in the Americas, the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the Central African Customs and Economic Union (UDEAC) in Africa, and the Asia-Pacific Economic Cooperation Forum (APEC) and the South Asian Association for Regional Cooperation (SAARC) in Asia, have established or are in the process of establishing working groups on competition, and some intend to adopt regional competition rules.

2. UNCTAD, the World Bank and OECD have been very active in spreading competition law and policy principles throughout the world, while competition authorities of member States have also been very active in this field, both bilaterally and through active cooperation with international organizations. Another indication of the higher profile attributed to competition by international organizations is the increasing numbers of publications issued in this respect. 1/

3. In the period between the Third United Nations Conference to Review All Aspects of the Set in 1995 and the Fourth Review Conference (scheduled for 25-29 September 2000), two Expert Meetings on Competition Law and Policy and two sessions of the Intergovernmental Group of Experts on Competition Law and Policy will have taken place at UNCTAD. The 1999 session of the Intergovernmental Group of Experts will act as the preparatory meeting for the Fourth Review Conference.

4. The December 1996 Singapore Declaration, 2/ which established two new Working Groups at WTO - a Working Group on Trade and Investment, and a Working Group on the Interaction between Trade and Competition Policy - requested the latter group "to identify areas that may merit further consideration in the WTO framework". In the Singapore Declaration, it was agreed that "these groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate international forums". In the conduct of the WTO Working Groups, cooperation with UNCTAD and other appropriate organizations was called for "to make the best use of available resources and to ensure that the development dimension is taken fully into account" (para. 20 of the Singapore Declaration). In line with the Singapore Declaration, UNCTAD has been represented in the Working Group on the Interaction between Trade and Competition Policy in an observer capacity, and it has cooperated fully in ensuring that the development dimension is taken

fully into account. Special attention was drawn by UNCTAD to the provision for preferential and differential treatment contained in section B of the Set of Principles and Rules. Cooperation has included the holding of three joint WTO/UNCTAD/World Bank Symposiums on Competition Policy, Economic Development and the Multilateral Trading System. In its agreed conclusions of July 1998 (TD/B/COM.2/13-TD/B/COM.2/CLP.5, annex I), the Intergovernmental Group of Experts on Competition Law and Policy invited the Secretary-General of UNCTAD to continue cooperation with WTO and other organizations working in the area of competition law and policy. Future work by WTO in the field of trade and competition policy will be decided at the forthcoming WTO Ministerial Conference in Seattle (30 November-3 December 1999).

5. In February 2000, UNCTAD X is scheduled to take place in Bangkok. The Conference, which is to examine "developmental strategies in an increasingly interdependent world: applying the lessons of the past to make globalization an effective instrument for the development of all countries and all people", will have the opportunity to consider the role of competition law and policy in this context and to further pave the way for the Fourth Review Conference.

II. OPERATION OF THE SET SINCE THE THIRD REVIEW CONFERENCE

6. Objective No. 1 of the Set, namely "to ensure that restrictive business practices do not impede or negate the realization of the benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries", is of particular relevance today, as globalization is rapidly expanding and more and more questions are being raised concerning the effects of liberalization and globalization of world markets, especially with respect to the weaker players on the global stage.

7. One important issue is the rapidly growing concentration of market power which is taking place in global markets through mergers and acquisitions, constantly raising the level of entry for new players in such markets. While important actions to challenge abuses of dominant positions of market power are taking place within some developed countries, 3/ most developing countries are still unable to come to grips with the creation and abuse of dominant market power affecting their national interests both in domestic markets and, especially, in world markets.

8. With respect to objective No. 2, namely "to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through (a) the creation, encouragement and protection of competition; (b) control of concentration of market power; (c) encouragement of innovation", the results have been mixed during the period under review. While, since 1995, most developing countries and economies in transition have shown interest in competition policy and many have requested technical assistance and advisory services to draft new legislation, to date only a few have actually adopted new competition laws: Panama, Hungary and Romania (in 1996), Zimbabwe (in 1997) and Morocco (to be confirmed in 1999). Moreover, as discussed in the concluding chapter of this note, it is not sufficient for a country to have a competition law on its statute books; it is necessary for its competition policy to have an effective

impact on the economy. Setting up a competition authority can take time, and political will is necessary to sustain the momentum in the years that follow its establishment. Some countries undergoing economic crises or changes of Government may find that their Governments have changed priorities, and some competition authorities which enjoyed political support when they were established may now face decay and loss of support from the executive power.

9. Objective No. 3, namely "to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries", is receiving increased attention in some countries. As a result of UNCTAD IX's decision to request the UNCTAD secretariat to "support strategies in promoting national competition and consumer protection law and policy formulation" (TD/377, para. 97 (ii)), UNCTAD has implemented technical assistance programmes which include a strong consumer protection component. While the immediate objective of modern competition law is to increase efficiency by promoting competition, one of its important side-effects is no doubt to benefit consumers. Moreover, it is increasingly felt that one way to overcome difficulties of implementing competition policy in many developing countries where this is a very new concept which needs to be widely understood is to create and strengthen consumer organizations, which can usefully contribute to consumer information, improve transparency, and often draw the attention of competition authorities to anti-competitive practices.

The development dimension in the Set

10. Section C, on Multilaterally agreed equitable principles for the control of RBP, recognizes in its paragraph 6 the possibility for national legislation to exclude certain sectors from the scope of national competition law, and in paragraph 7 provides for "preferential or differential treatment for developing countries" in order to take into account "the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and

(b) Encouraging their economic development through regional or global arrangements among developing countries."

11. At a time when UNCTAD and other appropriate intergovernmental forums are being called upon "to ensure that the development dimension is taken fully into account", 4/ it is important to draw attention, as UNCTAD representatives have done repeatedly at WTO and other meetings, to the development dimension contained in the UN Set. In line with provision C.7 of the Set, developing countries should be in a position, if need be, to adopt new competition legislation in a progressive or more flexible manner, i.e. by being able to exempt certain sectors from full application of the law, if this is considered necessary for developmental reasons. It should be recalled that exceptions and exemptions from competition laws still exist in many developed countries, for example in sectors such as agriculture, mining, and services. While pressure to deregulate most of those sectors is having an effect in many countries, it should be borne in mind that some countries have maintained such exceptions for some 50 years. A degree of flexibility for countries newly

opening their market is therefore fully in line with this provision of the Set. Developing countries concerned with the risk of eliminating local industry as a result of sudden opening of specific markets to strong competition should therefore be in a position to take a more flexible, gradualistic approach in order to ensure that liberalization takes place when their industries are more efficient and are able to compete. Of course, it is not in the interest of countries to keep afloat industries which are never going to be viable without protection and subsidies, distorting the allocation of scarce resources.

12. In some countries, SMEs are allowed to join forces in certain instances, for example in joint-purchasing arrangements in Germany, which allow them to obtain conditions of purchase similar to those obtained by large firms for their inputs, hence enabling them to compete more effectively with the larger enterprises. Under the Set, similar considerations would be fully justified for developing countries.

The main anti-competitive practices

13. Section D of the Set, on principles and rules for enterprises, including transnational corporations, contains the core anti-competitive practices that should be refrained from by enterprises "engaged on the market in rival or potentially rival activities" or when "through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition" (Section D, paras. 3 and 4). The treatment of horizontal and vertical restraints, as well as dominance and abuse of dominant market power, is further elaborated in UNCTAD's Model Law or Laws on Restrictive Business Practices, of which the latest version is contained in document TD/B/RBP/81/Rev.5. It should be noted that, once the amendments concerning merger provisions are finalized, the full text of the Model Law should be revamped and made more "reader-friendly" in time for the Fourth Review Conference.

14. The Model Law contains in its Part I a list of draft possible elements for articles of a competition law, including the title of the law; its objectives or purpose; definitions and scope of application; restrictive agreements or arrangements; acts or behaviour constituting an abuse, or acquisition and abuse, of a dominant position of market power; some possible aspects of consumer protection; notification; the administering authority and its organization; functions and powers of the administering authority; sanctions and relief; appeals; and actions for damages. This quite simple "backbone" or "table of contents" of issues to consider when drafting a competition law is then complemented in Part II of the Model Law with detailed commentary to the articles, in which a review is made of actual laws in both developed and developing countries, as well as countries in transition, with a view to determining the most recent trends and views on how best to treat each one of the issues considered in the "elements for articles" of the law contained in Part I.

15. It should be noted that some "elements for articles", such as "some possible aspects of consumer protection"; "notification" or perhaps "action for damages", are listed in the Model Law as part of a checklist of issues to be considered for inclusion, but it will depend on legislators to decide whether

to include them in the competition law or not. For example, the most recent trend has been to adopt consumer protection provisions in an entirely separate law, as competition law is now viewed by most countries as having the promotion of competition as its principal objective and separate legislation is felt necessary to cover more fully the issue of consumer protection. Also, with respect to mergers and acquisitions, the Set itself might need to be modified by the Fourth Review Conference, if it is deemed necessary, as this item is presently mentioned under acquisition and abuse of dominant position of market power, in Section D.4 (c) of the Set.

16. Section E of the Set, on principles and rules for States at national, regional and subregional levels, and section F, on international measures, complement each other, as the call in paragraph 1 of Section E for States "at the national level or through regional groupings" to "adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures", and the provisions calling for exchanges of information and cooperation in Section E are somewhat complemented in Section F which calls for "work aimed at achieving common approaches" (para. 1); consultations among States (para. 4); continued work within UNCTAD on the elaboration of a Model Law or Laws (para. 5) and technical assistance, advisory and training services (para. 6).

17. As indicated in the introduction to this note, in the period since the Third Review Conference there has been considerable interest on the part of developing countries and economies in transition in studying the issues involved and in starting to draft competition bills. However, very few countries have adopted new competition laws in the period under review. It can be said, nevertheless, that most countries in the world are now aware of the issues involved in competition policy, and that many envisage the adoption of domestic legislation in the near future. One can also say that common approaches and trends are on the rise, largely as a result of the important exchanges of views and consultations that take place within the framework of bilateral, regional and multilateral consultations, for example under bilateral cooperation agreements where they exist, and other consultations in OECD, the WTO Working Group and UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy at its annual sessions.

18. The informal consultations which take place annually during sessions of the Intergovernmental Group of Experts on Competition Law and Policy have become an appreciated feature of UNCTAD's intergovernmental machinery. This function of the Intergovernmental Group was decided on by the Third Review Conference (para. 9 of the resolution adopted by the Review Conference). 5/

19. Concerning Section G of the Set, on international institutional machinery, it is important to note that, while retaining the functions of the Intergovernmental Group of Experts, by recommending in paragraph 13 of its resolution "the continuation of the important and useful work programme within UNCTAD's intergovernmental machinery that addresses competition law and policy issues, and proceeds with the active support and participation of competition law and policy authorities of member countries", the Third Review Conference recommended to the General Assembly to change the name of the Intergovernmental Group of Experts on Restrictive Business Practices Intergovernmental Group of Experts on Competition Law and Policy (para. 14 of

the resolution). This recommendation was endorsed by the General Assembly in its resolution 52/182, paragraph 5, of 18 December 1997, and in 1998 the Intergovernmental Group of Experts met under its new name.

III. PROGRESS IN IMPLEMENTATION OF THE RESOLUTION ADOPTED BY THE THIRD REVIEW CONFERENCE

20. The resolution adopted by the Third Review Conference (TD/RBP/CONF.4/15, annex I) requested the UNCTAD secretariat to revise documents presented to the Review Conference (para. 1), to revise periodically the commentary to the Model Law (para. 3) and to prepare a draft outline of a possible study on empirical evidence of the benefits to be gained by countries from applying competition law and policy principles to economic development (para. 8). All these studies were prepared, in line with the requests contained in the resolution.

21. The UNCTAD secretariat was also requested to carry out a review of technical cooperation activities undertaken by UNCTAD and other international organizations, as well as by States bilaterally. That review was contained in document TD/B/COM.2/EM/9 and was submitted to the Expert Meeting on Competition Law and Policy on 24 November 1997; an updated review (TD/B/COM.2/CLP/2) was submitted to the Intergovernmental Group of Experts on Competition Law and Policy on 29 July 1998.

22. Requests for technical assistance were met at a higher pace than in the past, in particular thanks to increased voluntary contributions and expertise received from, among others, Norway, the Netherlands, Italy, France, Germany, the United Kingdom, the United States, the European Union and Sweden, in line with the Review Conference's appeal contained in paragraph 7 of its resolution. As can be seen in detail in the reviews of technical cooperation mentioned above, the UNCTAD secretariat has made a considerable effort to respond as much as possible to the needs expressed by member States at the national as well as subregional levels.

23. With respect to the operation of the Intergovernmental Group of Experts itself, the Third Review Conference decided to promote informal multilateral consultations among participants on competition law and policy issues with special focus on practical cases (para. 9 of its resolution). As agreed by the Review Conference, at each session of the Intergovernmental Group of Experts on Competition Law and Policy, an understanding is reached as to the subject matter of the consultations to be undertaken during the next session. In addition, member States are invited, if they so wish, to submit additional cases for discussion during the consultations, at least one month in advance of the session of the Group of Experts so as to permit delegations from all member States to participate.

24. It should be noted that in paragraph 9 of its resolution, the Review Conference requested that "future Intergovernmental Group of Experts sessions should include at least three days for informal multilateral consultations"; however, this was decided at a time when the duration of sessions was five days; the post-Midrand duration of expert meeting sessions, and subsequently intergovernmental groups of experts, was shortened to three days, and for this reason, the time allotted for informal consultations was three to

four half-day sessions. This arrangement seems to have been very satisfactory, as the functioning of the Expert Meeting, followed by the Intergovernmental Group of Experts on Competition Law and Policy, was highly praised by all delegations at UNCTAD's Mid-Term Review, which took place in 1998.

25. In paragraph 11 of its resolution, the Review Conference decided that,

"in the light of the strong worldwide trend towards the adoption or reform of competition laws and the development of national competition laws and policies over the period since the Set was adopted, the Intergovernmental Group of Experts should embark on an exercise, upon request from member States and in collaboration with national and regional competition law and policy authorities, to map out and further strengthen common ground among States in the area of competition law and policy in identifying restrictive business practices that affect the economic development of countries. In this context, the focus of the exercise, inter alia, should be on:

(a) Identifying 'common ground', i.e. broad similarities in the approaches followed on different competition law and policy questions by Governments;

(b) Shedding light and encouraging exchanges of views in those areas where the identification of 'common ground' is more difficult, for example where there are differences among economic theories, or among competition laws or policies, such as:

(i) The role of competition law and policy in the strengthening and improvement of the economies of developing and other countries and, in particular, the development of the business community;

(ii) Taking into account economic globalization and liberalization of the economies of developing and other countries, to identify appropriate measures to help those countries that might be hampered by RBPs;

(iii) The interface between competition law and policy, technological innovation and efficiency;

(iv) The competition law and policy treatment of vertical restraints and abuses of dominant positions;

(v) The competition policy treatment of the exercise of intellectual property rights (IPRs) and of licences of IPRs or know-how;

(vi) In-depth analysis of differences in the scope of competition laws and policies in individual sectors, in the light of the process of economic globalization and liberalization;

(vii) In-depth analysis of the effectiveness of enforcement of competition laws, including enforcement in cases of RBPs having effects in more than one country."

26. The competition experts and the UNCTAD secretariat have, through the informal consultations and the work embarked upon at the Expert Meetings and sessions of the Intergovernemntal Group of Experts on Competition Law and Policy, as well as in technical cooperation programmes, contributed consistently to identifying the extent of "common ground" that exists in the approaches followed by States on different competition law and policy questions; in so doing, they have also shed light and exchanged views on those areas where differences exist. In particular, the study on empirical evidence of the benefits of competition law and policy (TD/B/COM.2/EM/10/Rev.1) responds at least in part to paragraph 11 (b)(i) of the Conference resolution, and the work under way on "how competition policy addresses the exercise of intellectual property rights" (TD/B/COM.2/CLP/10) should respond to paragraph 11 (b)(v) and in part to paragraph 11 (b)(iii). The question raised under paragraph 11 (b)(iv) was partly treated in document UNCTAD/ITCD/CLP/Misc.8 on vertical restraints, prepared by the secretariat in connection with its technical cooperation projects. Finally, while a first attempt to analyse the effectiveness of enforcement of competition laws in cases of RBPs having effects in more than one country was made in document TD/RBP/CONF.4/6, submitted to the Third Review Conference itself, no further attempt has been made to make further progress on the topic referred to in paragraph 11 (b)(vii) of the resolution.

27. The issues which so far have not been directly dealt with by the Intertovernemntal Group of Experts concern the topics referred to in paragraphs 11 (b)(ii) and (vi). These are important issues relating to the developmental dimension of competition law and policy that the Fourth Review Conference might wish to focus on.

28. Finally, the Third Review Conference, in paragraph 12 of its resolution, invited Governments

"during future consultations in meetings of the Intergovernmental Group of Experts, to clarify the scope or application of their competition laws and policies, with a view to improving mutual understanding about substantive principles and procedures of competition law and policy, taking into account relevant provisions of the Uruguay Round Agreements. In the context of this exercise, Governments may wish to discuss:

(a) How the Set of Principles and Rules might be better implemented, particularly those provisions which have not been adequately implemented so far;

(b) The competition policy implications at the national, regional and international levels of globalization and liberalization;

(c) Techniques and procedures for detecting and sanctioning collusive tendering, including international cartels and other anti-competitive practices;

(d) The strengthening of information exchange, consultations and cooperation in enforcement at the bilateral, regional and multilateral levels;

(e) How competition laws and policy should apply to State activities such as regulation of State enterprises, State monopolies, natural monopolies and enterprises with exclusive rights granted by the State".

29. Again, the informal consultations and the studies prepared for the expert meetings, as well as some papers prepared for technical cooperation activities, have or are in the process of covering some of the issues noted above. In particular, the report on the experiences gained so far with international cooperation on competition policy issues and the mechanisms used, submitted in document TD/B/COM.2/CLP/11 to the second session of the Intergovernmental Group of Experts on Competition Law and Policy (7-9 June 1999) should attempt to respond to paragraph 12 (d) above. Two papers prepared by the secretariat in the context of technical cooperation, namely "Control of price-fixing and collusive tendering arrangements" (UNCTAD/ITCD/CLP/Misc.4) and "Competition and Public Utility Industries" (UNCTAD/ITCD/CLP/Misc.1) should at least partly respond to paragraphs 12 (c) and (e), respectively. Further, the topic for the informal consultations of the 1999 session of the Intergovernmental Group of Experts on Competition Law and Policy on "The relationship between the competition authority and relevant regulatory agencies, especially in respect of privatization and demonopolization processes" should contain important elements of response to paragraph 12 (e) of the resolution.

30. Under paragraph 12 of the resolution, two points have so far not been substantially analysed, namely (a) how the Set might be better implemented, and (b) the competition policy implications of globalization and liberalization at national, regional and international levels. Some thoughts on a response to these questions may be found in the concluding remarks below.

IV. OUTLOOK FOR THE FOURTH REVIEW CONFERENCE

31. Scheduled to meet in September 2000, after UNCTAD X and the WTO Ministerial Conference in Seattle, the Fourth Review Conference will have an exceptional opportunity to build upon the results of these important meetings of the turn of the century. It is of course not possible to speculate on the results of these two important international Conferences, but it may be permissible at this point to reflect on the agenda items to be discussed there.

32. UNCTAD X is likely to revisit the policy framework for global trade and finance. As decided in the agreed annotations to the draft substantive agenda item for UNCTAD X, "UNCTAD should consider the strategies and policies which are most likely to ensure the successful integration of all countries concerned, particularly the developing countries, into the world economy on an equitable basis and to avoid the risk of further marginalization". In this respect, the role of competition policy in bringing about a more equitable playing field at national, regional and multilateral levels is likely to be

considered by the Conference. Decisions in this field by UNCTAD X should be directly relevant to the work of the Fourth Review Conference.

33. It should be noted that, since the Third Review Conference in 1995, the general convergence of views and relative optimism about market liberalization and globalization have given way to a more mitigated analysis and often pessimistic views, fuelled by financial crises and economic problems around the world, especially in emerging markets, to the effect that globalization - often understood as reflecting "free competition at the global level" - far from having positive effects for all trading partners, increases economic disparities among countries, with the result that a number of developing countries, particularly the LDCs, run the risk of marginalization. It should be stressed in this respect that the actual process of globalization is far from having been one of free competition where the principles of competition policy apply at the global level. While developed countries apply those principles with respect to their domestic markets, few developing countries have so far been able to implement their competition rules effectively within their national borders. In many developing countries and economies in transition, the competition authority is new, lacking in experience and especially in financial resources, and often unable to count on continued political support. In addition, most of these countries have been used to State intervention in closed economies, and the fundamental principles of competition are new for their economic actors, businessmen and consumers. The advocacy function and educative role of the competition authority represent a considerable task which needs commensurate financial resources and, above all, time. Moreover, global markets often escape from competition rules altogether, because of the difficulties national authorities face in coming to grips with anti-competitive practices originating in overseas markets. Hence, the system in operation so far can be compared with a market which has been partly liberalized, but where competition rules still need to be implemented fully. If liberalization and globalization are to prove beneficial, progress will have to be achieved in enforcing competition policy at the national, regional, but also multilateral - or global - levels.

34. The UN Set, as reconfirmed by three Review Conferences, has the value of being so far the only fully multilaterally agreed principles and rules on competition. It also encompasses the development dimension by endorsing the principle of special and differential treatment, especially for the least developed countries. Meeting after UNCTAD X and the WTO Ministerial Meeting, the Fourth Review Conference will have a full opportunity to make its contribution to bringing about a more equitable and successful playing field in global markets.

Notes

1/ See for example, UNCTAD, World Investment Report 1997 (United Nations publication, Sales No. E.97.II.D.10), and WTO, Annual Report 1997.

2/ The Singapore Declaration (WT/MIN(96)/DEC/W) was adopted on 13 December 1996 at the close of the WTO Ministerial Conference, held in Singapore, on 9-13 December 1996.

3/ See, for example, US Government v. Microsoft, Inc.

4/ See Singapore Ministerial Declaration (WT/MIN(96)/DEC/W) of 13 December 1996, para. 20.

5/ See TD/RBP/CONF.4/15, annex I.

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